AGREED RECORD

SUPREME COURT OF THE UNITED ST

[redacted] TERM, [redacted]

[redacted] 72

THE PROVO REEDER CANAL AND IRRIGATION COMPANY AND THE NORTH UNION IRRIGATION COMPANY, PLAINTIFFS IN ERROR,

vs.

OREN TANNER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF U[redacted]

FILED FEBRUARY 24, 1916.

([redacted])

(24,060)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 367.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY AND THE NORTH UNION IRRIGATION COMPANY, PLAINTIFFS IN ERROR,

vs.

CALEB TANNER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

INDEX.

	Original.	Print
Stipulation as to printing record	*a*	1
Appellants' abstract of record	*b*	1
Amended complaint	1	1
Answer to amended complaint	9	6
Findings of fact	16	9
Decree	25	14
Bill of exceptions	33	18
Motion for new trial	33	18
Statement of proceedings	35	19
Evidence	35	19
Testimony of Caleb Tanner	36	19
Walter W. McLaughlin	39	21
W. B. Searle	40	22
Caleb Tanner (recalled)	41	22
Hyrum F. Thomas	45	24
Walter W. McLaughlin (recalled)	45	24
Caleb Tanner (recalled)	45	25
Plaintiff rests	46	25
Motion for nonsuit	46	25
Testimony of Caleb Tanner (recalled)	49	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1914.

	Original.	Print
Testimony of W. B. Searle (recalled)	51	28
Plaintiff rests again	52	28
Testimony of H. J. W. Goddard	52	28
James Gray	54	29
Joshua V. Jones	55	30
Robert Thorn	55	30
Wm. Ercanback	56	30
James A. Loveless	57	31
T. J. Patten	59	32
Frank Wentz	61	32
Robert Thorn (recalled)	61	33
A. B. Walker	62	33
N. J. Knight	63	34
Robert Thorn (recalled)	63	34
Mark Kartchner	64	34
Jas. A. Loveless (recalled)	64	34
A. B. Walker (recalled)	65	35
John S. Park	67	36
Jas. Gray (recalled)	68	36
Defendants rest	69	36
Testimony of W. B. Searle (recalled)	69	37
Certificates to bill of exceptions	71	37
Notice of appeal	73	39
Clerk's certificate	74	39
Assignment of errors	75	39
Submission	347	42
Judgment	348	42
Opinion	349	42
Dissenting opinion	367	54
Petition for writ of error	368	54
Writ of error	372	57
Citation and service	373	58
Assignment of errors	374	59
Waiver of bond	375	59
Clerk's certificate	376	60
Order enlarging time to file record	377	60

a In the Supreme Court of the United States.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Plaintiffs in Error,

vs.

CALEB TANNER, Defendant in Error.

Stipulation.

In the above-entitled cause, it is hereby stipulated and agreed by all the parties herein, that it is and will be unnecessary to print any portion of the record herein except that contained in the printed abstract hereto attached, and marked "Exhibit A" and the opinions of the Supreme Court of the State of Utah, rendered in this cause, as all the matter relied upon for a reversal of the judgment herein is fully set out in said printed abstract, hereto attached. The purpose of this stipulation is to avoid unnecessary expense. Made and entered into at Salt Lake City, Utah, this 4" day of December, A. D. 1913.

J. W. N. WHITECOTTON,
Attorney for Plaintiffs in Error.
D. D. HOUTZ,
Attorney for Defendant in Error.

b "EXHIBIT A."

In the Supreme Court, State of Utah, October Term, 1910.

CALEB TANNER, Plaintiff and Respondent,

vs.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Defendants and Appellants.

Appellants' Abstract.

J. W. N. Whitecotton, Samuel R. Thurman, Attorneys for Appellants.

1 In the District Court of the Fourth Judicial District of the State of Utah in and for Utah County.

CALEB TANNER, Plaintiff,

vs.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Defendants.

Amended Complaint.

Plaintiff complaints of the Defendants, and for his cause of action alleges:

2

I.

That the Defendants are several corporations organized and existing under and by virtue of the laws of the State of Utah.

II.

That more than twenty-five years ago when a portion of the waters of Provo River, in Utah County, State of Utah, were unappropriated, the grantors and predecessors in interest of this Plaintiff entered upon the said river and placed dams therein and constructed ditches and canals therefrom to and upon lands owned by the several grantors of Plaintiff, and diverted from said dams through said canals to and upon their said lands, and then and there appropriated of the unappropriated waters of said Provo River a flow thereof of ten cubic feet per second of time of said waters; and they, the grantors and predecessors of interest of said Plaintiff, then and there applied the said waters to the irrigation of said lands, and for their domestic and culinary purposes; and they, the said grantors and predecessors in interest of this Plaintiff, together with this Plaintiff, have continued to appropriate and use the said waters of said river a flow thereof of ten cubic feet per second of time, and during all of said time they, the grantors and predecessors in interest of this Plaintiff continued to be the owners of the right to use said flow, and this Plaintiff as the successor in interest of his said grantors and predecessors, ever since has continued the said appropriation and use of the said water, and is now the owner of the right, and is entitled to the use of the said ten second feet of water; that in the year

3

1907, January 26, by decree of the above named Court, the grantors and predecessors in interest of this Plaintiff were adjudicated, decreed and determined to be the owners of the right and title to the use of the said ten cubic feet of water from the said Provo River, which said decree has ever since remained unmodified and subsisting, and this Plaintiff has succeeded to their rights determined by the said decree, and now is the owner thereof with the right to the use thereof for domestic and irrigation purposes.

III.

That Plaintiff has the right to divert the said waters described in paragraph two, from the said river at the head of the canal of the Defendant, the Provo Bench Canal and Irrigation Company, as hereinafter described, and this plaintiff has no canal or waterway by means whereof he may convey the said water to the place where he has a use therefor as the complaint sets forth.

IV.

That the Defendant, the Provo Bench Canal and Irrigation Company, for the purpose of diverting the waters of Provo River, and conveying the same therefrom out upon Provo Bench, there to be used for irrigation and domestic purposes by its stockholders, ac-

quired an easement and right of way and constructed a canal, about sixteen feet wide and about two and one-half feet carrying capacity in depth, over the following described course, to-wit: Beginning at a point on the bank of Provo River, near the mouth of Provo Canyon, in Utah County, State of Utah, which said point is
4 2,155 feet south, 9 degrees and 57 minutes east from the northeast corner of Section 12, Tp. 6 south, R. 2 east, Salt Lake meridian, which said point is marked on Plat "A" hereunto attached, as Station O, said plat being hereby referred to in all matters for description, and made a part of this complaint, and running thence southwesterly with such variations and irregularities as to render a description thereof by a traverse line necessary with offsets to said canal, which said offsets are given in Plat "A," and said traverse line being as follows: Commencing at said Station O, and running thence south 20 degrees, west 163 feet to Station 1, thence south 17 degrees 16 minutes, west 354 feet to Station 2, thence south 32 degrees and 33 minutes, west 194.1 feet to Station 3, thence south 77 degrees 4 minutes, west 749.4 feet to Station 4, thence south 22 degrees 14 minutes, west 688.5 feet to Station 5, thence south 27 degrees 4 minutes, west 503 feet to Station 6, thence south 44 degrees 20 minutes, west 499.6 feet to Station 7, thence south 19 degrees 35 minutes, west 495.6 feet to Station 8, thence south 25 degrees 56 minutes, west 600.9 feet to Station 9, thence south 20 degrees 50 minutes, west 415.6 feet to Station 10, thence south 5 degrees 7 minutes, west 434.4 feet to Station 11, thence south 32 degrees 1 minute, west 467.4 feet to Station 12, thence south 34 degrees 53 minutes west 179 feet to Station 13, thence south 2 degrees 6 minutes west 291.7 feet to Station 14, thence north 16 degrees 56 minutes east 400.6 feet to Station 15, thence south 13 degrees 7 minutes west 396 feet to Station 16, thence south 4 degrees 40 minutes west 284.1 feet to Station 17, thence south 25 degrees 3 minutes west 432.2 feet to Station 18, thence south 19 degrees 40 minutes west 227.9 feet to Station 19,
5 thence south 30 degrees 8 minutes west 618.6 feet to Station 20, thence south 8 degrees 12 minutes west 407.9 feet to Station 21, and thence south 64 degrees 26 minutes west 285.7 feet to Station 22, at a dividing gate in said canal, which is the terminus of the said canal owned by the Defendant, the Provo Bench Canal and Irrigation Company, and which said canal is 9,200 feet in length.

V.

That the Defendant, the North Union Irrigation Company, for the purpose of receiving water through the canal above described, and conveying the same from the said terminus at said Station 22, and conveying the same over and upon Provo Bench, there to be used by its stockholders and others for irrigation and domestic use acquired an easement and right of way and constructed a canal about ten feet in width and about two feet in depth, carrying capacity, over the following described course, to-wit: Beginning at said Station 22 and running thence westerly and northwesterly with such

irregularity and variation as to require description thereof with traverse lines and setoffs, as in the canal aforesaid, which said setoffs are shown in the said plat to which reference is hereby made, and running thence south 60 degrees 11 minutes west 250.1 feet to Station 23; thence north 77 degrees 1 minute, west 194.3 feet to Station 24; thence north 52 degrees 26 minutes, west 307 feet to Station 25; thence north 73 degrees 3 minutes, west 457.6 feet to Station 26; thence north 15 degrees 33 minutes, west 548.5 feet to Station 27; thence north 46 degrees 12 minutes, west 523.5
6 feet to Station 28; thence north 42 degrees 7 minutes, west 1,012.8 feet to Station 29; thence north 50 degrees 19 minutes, west 774.8 feet to Station 30; and thence north 55 degrees 6 minutes, west 1,326.6 feet to Station 31, at which said point the Plaintiff wishes to draw his water from the said canal as hereinafter stated.

VI.

That the several canals above described are a part of one system of canals, and constitute a continuous waterway, the said North Union Irrigation Company receiving from and through the Provo Bench Canal and Irrigation Company's canal waters from Provo River, to which it is entitled to the use of, and both of the said canals in their entire course and excavations, cuts and fills of earth, and are such as to admit of enlargement and increased carrying capacity.

VII.

That the map accompanying this complaint and attached thereto and made a part hereof, and denominated Plat "A," is in all respects true and correct, and accurately described the land over which said canals extend and their location thereon, and is presented with this complaint as a description thereof.

VIII.

That there is about one thousand acres of arid land owned by divers persons near the north end of the said canal of the North Union Irrigation Company, as described, and it is so located
7 with respect thereto that it is capable of being irrigated by waters drawn through the said canals; that said land is now barren and unproductive, and without artificial irrigation must remain so, and the only available source of water supply for the same is from Provo River, and the water now taken from the said river is insufficient to supply water for the said land, and in addition thereto there is a large area of land in the same location, for the irrigation of which the water supply is wholly insufficient, and water, for irrigation in the said locality has a ready rental value for irrigation and other purposes, and by increasing the said water supply in the said locality much arid land will be redeemed, and the use of such water be made of great value to its owner for rental and other purposes. That it is the Plaintiff's intention to, and he will,

if he is permitted to enlarge the said canals as hereinafter prayed for, supply water for rental, to be used in the redemption of the said arid lands, and increase the supply for lands where the water right is at present insufficient, and divers persons are now ready upon assurance that such water can be supplied to enter into contract with the Plaintiff for the use thereof.

IX.

That the country over which Plaintiff would be compelled to construct an independent and new canal, in order to get his said water to the said lands, is such that the costs thereof would exceed the value of his said water right, and there is no other available or feasible means of conveying said water to the said land, than that
8 of enlarging the said canals owned by the Defendants severally as above described, and the said enlargement can be
— -ants or either of them.

X.

That no parts of the lands traversed by the said canals or either of them is owned by the Defendants or either of them, and each of the Defendants has merely an easement thereon for canal purposes and conveying waters there through. That prior to the commencement of this action, the Plaintiff *has* acquired the consent and permission of the several owners of the fee in the lands traversed by the said canals to enlarge the same, but the Defendants and each of them refuse to permit this Plaintiff to enlarge the said canals and refuse to permit him to run his said waters there through.

XI.

That the Plaintiff herewith presents a profile and cross-section plat of both of the said canals, with projected enlargement thereon, which is marked Plat "B," and is hereunto attached, and is made a part of this complaint, and the matter therein contained is in all respects true and correct.

Wherefore, the Plaintiff demands judgment:

That he be permitted to increase the carrying capacity of each of the said canals to the extent of ten cubic feet of water per second of time, by enlarging the same, and that the character of such enlargement be determined.

That the damage to each of the defendants by such en-
9 largement of the said canals be determined, and that upon payment of such damage, and the enlargement of the said canals the Plaintiff be decreed the perpetual right to flow water in the said canal to the extent of the said enlargement, and that such other and further order be made herein as is meet and equitable.

Plaintiff prays for general relief and for his costs.

D. D. HOUTZ,
Plaintiff's Attorney.

Duly verified and filed July 16th, 1908.

(Title of Court and Cause.)

Answer to Amended Complaint.

Come now the Defendants named in the above entitled action, and for answer to Plaintiff's amended complaint, say:

1. That they admit the allegations contained in paragraph I of said amended complaint.

2. Answering paragraph II thereof Defendants say: They have no sufficient knowledge to enable them to answer positively the allegations contained in said paragraph, but they are informed and believe, and upon such their information and belief say, that it is not true that the grantors or predecessors in interest of the Plaintiff, at the time named or at any time, in the manner mentioned
10 or in any manner, appropriated of the unappropriated waters of Provo River, ten second feet of said water, or any quantity to exceed three (3) second feet thereof, and that the said appropriation was for use upon the lands situated principally in the South Fork of Provo Canyon, from what is known as the South Fork of Provo River, and that the said water so appropriated was used only upon the lands situated along the said river, and that said lands were and are very steep, and the water used thereon almost immediately ran off the said lands and found its way back into the main channel of Provo River, and thus became and was available for the use of other appropriators of the waters of said river, who diverted them from the channel thereof below the place of use by the said grantors and predecessors in interest of the Plaintiff in this action. Defendants are informed and believe, and upon such information and belief allege the fact to be, that the grantors and predecessors in interest of the Plaintiff appropriated and used whatever water they did appropriate and use at points *distance* twelve to fifteen miles above the mouth of Provo Canyon, and whatever quantity of water the Plaintiff's grantors and predecessors in interest, or the Plaintiff might have the right to use at the said points of diversion, would be subject to diminution by evaporation and seepage and general loss in volume in flowing down said river said distance of twelve to fifteen miles, and Defendants allege upon their information and belief, that said water would be by said means of loss diminished at least twenty-five per cent. Upon their information and belief, Defendants deny that the Plaintiff's grantors and predecessors in interest ever appropriated or used in the manner and at the time alleged, or in any
11 manner or at any time, more than one second foot of the waters of Provo River, at the places of diversion, or that they and all of them ever consumed more than one second foot of said waters, and upon information and belief, Defendants deny that the Plaintiff would in any event be entitled to have more than three-quarters of a cubic foot of said waters per second of time at the mouth of Provo Canyon. Defendants have no knowledge nor sufficient information to enable them to form a belief as to the allegation of conveyance to Plaintiff of the rights of any original appropriators of

said waters, and they therefore on that ground deny the same and put the Plaintiff upon his proof. They admit that a decree of the date alleged was entered, and that the same is still in full force and effect, but upon their information and belief they deny that the said decree awards to the grantors and predecessors in interest of the Plaintiff ten cubic feet of water per second of time or any quantity, more than three (3) second feet, and they allege that the said award was made by the court because of the special and peculiar conditions of the lands, watered by said water, the same being near the stream of said river, and being steep and causing the water to run off almost immediately into said stream so that the use thereof made by said parties did not materially diminish the supply of water in said river.

Defendants have no knowledge nor sufficient information to enable them to form a belief as to the allegation that the Plaintiff has succeeded to any rights fixed by said decree, and upon that ground they deny the same.

3. Answering paragraph III of said complaint, Defendants
12 say: They deny that the Plaintiff has the right to divert the waters described in paragraph II of his complaint from said river at the head of the canal of the Defendant, Provo Bench Canal and Irrigation Company, or any water to exceed three-quarters of a foot per second of time, and the Defendants deny upon information and belief that the Plaintiff has any right to divert any water at all at said place or any place.

4. Defendants admit the allegations *obtained* in paragraphs IV and V of said complaint.

5. Answering paragraph VI of said complaint, Defendants say: They admit the same except the allegation that said canals 'are such as to admit of enlargement, and increased carrying capacity," and this they deny with the qualification, to-wit: While it is possible to enlarge the said canals, the soil through which they are made is of a very porous nature, underlaid by a bed of gravel, which renders it extremely difficult to make a canal that will not leak, and the beds of said canals have been for many years settled and are now in a condition that enables them to hold the water flowing therein without excessive waste through leakage; but the Defendants allege that by breaking the bottom and banks thereof, it would become very difficult to again make said bottoms and banks impervious to water, and the same would necessarily result in great loss of water to the shareholders in said Defendant companies by the leakage and waste of water.

6. The defendants admit the allegations of the paragraph No. VII.

7. Answering paragraph VIII, Defendants say: They have
13 no knowledge of nor sufficient information to enable them to form a belief as to the allegations therein contained, and upon that ground they deny the same and every part thereof.

8. Defendants deny the allegations contained in paragraph IX of said amended complaint, and each of them.

9. Answering paragraph X of said complaint, Defendants admit the allegations contained in the first three lines thereof, and to the

word "therethrough" in the fourth line thereof; they have no knowledge of nor sufficient information to enable them to form a belief as to the allegations that prior to the commencement of this action the Plaintiff *has* acquired the consent and permission of the several owners of the fee in the lands traversed by the said canals to enlarge the same, and they admit that the Defendants and each of them refuse to permit this Plaintiff to enlarge the said canals and refuse to permit him to run his said claimed waters therethrough.

10. They admit the allegations contained in paragraph XI of said complaint.

Further answering Plaintiff's amended complaint, these Defendants affirmatively allege:

I.

That the canals of the Defendants were constructed at an actual cost of fifty thousand dollars ($50,000.00), and that the soil through which they are constructed is of a porous nature, containing much sand and gravel, and that under the soil is a bed of gravel,
14 which is very porous and difficult to so treat as to prevent the water from percolating through it. That in the year 1878, it became and was necessary for the defendants to enlarge their said canals, and it was made necessary to break up the surface of the said canals, and it required eighteen years' time for the Defendants to repuddle the said canals so that they would carry the water safely and without great waste, and during the said time great quantities of water went to waste owing to the inability of the Defendants to prevent the leakage therein.

That great quantities of water are necessarily carried in said canals to supply the stockholders thereof, and owing to the porous and loose character of the ground through which the said canals run, there is great danger at all times, even with great care, to prevent the banks of the canals from breaking and thus endangering the farms lying under the said canals from being flooded and washed away by the breaking thereof, and the Defendants are already under great liability to answer in damages for injuries that may occur to the said land owners having lands under said canals. That by permitting the banks of said canals to be interfered with by the Plaintiff, the Defendants' risk would be greatly increased. That in no event ought the Plaintiff to be permitted to interfere with the said canals for the enlargement thereof without fully and adequately indemnifying the Defendants against loss by the breaking of said canals and flooding the lands lying under the same by an ample bond with sufficient sureties, which Defendants allege should be in the sum of at least twenty-five thousand dollars.

15 II.

Defendants are informed and believe that there now is in process of organization a scheme looking to the construction of a large canal from near the mouth of Provo Canyon, leading to the vicinity of the land described in Plaintiff's complaint, upon which he desires to conduct any water which he may have the right to use, through

which he can conduct his said waters, if any he have, and Defendants are informed and believe, and upon such information and belief, allege that the Plaintiff can arrange to convey any such water through said proposed canal, at much less expense and outlay of money, and without any such risk of damage as will be threatened by his being permitted to interfere with the canals of the Defendants.

III.

That to permit the Plaintiff to invade and interfere with the canals of the Defendants as in his said complaint prayed for, would result in great and irreparable injury to the Defendants, and ought not in equity and good conscience to be permitted.

Wherefore, Defendants pray that Plaintiff take nothing by his complaint, and that Defendants recover their costs of this action.

J. W. N. WHITECOTTON,
Attorney for Defendants.

Duly verified, served and filed on the 22d day of August, 1908.

16 (Title of Court and Cause.)

Finding of Facts and Decree.

This cause having been brought on for hearing the 4th day of December, A. D. 1908, upon the amended complaint of the Plaintiff and answer thereto of the Defendants and was finished on the 8th day of December, 1908, and the Court having heard the evidence of the parties to said case and considered the same and the records and files therein, and the arguments of counsel, and being fully advised in the premises, finds the following facts:

1st. That the Defendants are each corporations.

2d. That the Plaintiff is the owner of certain waters and water rights in and to the waters of Provo River, together with the right to divert the same from same river at a point where the canal of the Provo Bench Canal & Irrigation Co., intersects said river, as hereinafter described.

3d. That the quantity of water owned by the said Plaintiff is a valuable and substantial flow; the exact amount of which is not hereby found, which, however, the Court determines exceeds in volume a flow in excess of two cubic feet per second of time; and the Court further finds that at certain seasons of the year there is a large flow of water in the said river in excess of the waters appropriated by any person or persons whatsoever, which is subject to an appropriation and which Plaintiff intends to appropriate and divert from the said river at a point aforesaid, together with the waters already owned by him.

4th. That there is about one thousand acres of arid land
17 located near the terminus of the canal of the Defendant, The North Union Irrigation Co., as hereinafter described, which

land is arid and will not produce agricultural crops without artificial irrigation, but with such irrigation it will produce valuable crops of agricultural products and the only available source of water supply to the said land is from the waters of Provo River and in addition to the said land in the same locality there is a large area of land under cultivation, the supply of water for the irrigation of which is inadequate; and waters for the said arid land and for said other lands which are insufficiently supplied with water, is in high demand, both for purchase and for rental purposes, and the Plaintiff therefore has a use for his said water at the point aforesaid, and the same would be of a value to him, delivered at said lands, of about twenty thousand dollars, and would redeem of the said lands and make them fruitful, not less than five hundred (500) acres of the same.

5th. That the Plaintiff has no lands upon which to use his said water and water right other than the land aforesaid, and it is his intention to and he will supply the said water for the reclamation of the above described land and irrigating the same upon the execution of the enlargement of the canals hereinafter described, as hereinafter decreed and authorized.

6th. That the Plaintiff has no canal or waterway by means whereof he may convey his said water to the said arid lands nor any canal or waterway to any lands or place where he has a use for the said water.

7th. That the Defendant, The Provo Bench Canal & Irri-
18 gation Co., for the purpose of diverting the water of Provo River and conveying the same therefrom out upon Provo Bench, there to be used for irrigation and domestic purposes by its stockholders, acquired an easement and right of way and constructed a canal about 15 feet wide and about 2½ feet deep, carrying capacity in depth of water over the following described course, to-wit:

Beginning at a point on the bank of Provo River near the mouth of Provo Canyon in Utah County, State of Utah, which said point is 2155 feet south, 9 degrees and 57 minutes east from the N. E. corner of section 12, Tp. 6 south, R. 2 east, Salt Lake Meridian; running thence southwesterly with such variations and irregularity as to render a description thereof by traverse line necessary with offsets to canal, which offsets extend from said traverse line to the center of the canal, which said traverse line is described as follows:

Commencing at the point aforesaid, which is known as station 0, and running thence south 20 degrees, west 163 feet to station 1; thence south 17 degrees 16 minutes, west 354 feet to station 2; thence south 32 degrees 33 minutes, west 194.1 feet to station 3; thence south 77 degrees 4 minutes, west 749.4 feet to station 4; thence south 22 degrees 14 minutes, west 688.5 feet to station 5; thence south 27 degrees 4 minutes, west 503 feet to station 6; thence south 44 degrees 20 minutes, west 499.6 feet to station 7, thence south 19 degrees 35 minutes, west 495.6 feet to station 8; thence south 25 degrees 56 minutes, west 600.9 feet to station 9; thence south 20 degrees 50 minutes, west 415.6 feet to station 10; thence south 5 degrees 7 minutes, west 434.4 feet to station 11;
19 thence south 32 degrees 1 minute, west 467.4 feet to station 12; thence south 34 degrees 53 minutes, west 179 feet to sta-

tion 13; thence south 2 degrees 6 minutes, west 291.7 feet to station 14; thence north 16 degrees 56 minutes, east 400.6 feet to station 15; thence south 13 degrees 7 minutes, west 396 feet to station 16; thence south 4 degrees 40 minutes, west 284.1 feet to station 17; thence south 25 degrees 3 minutes, west 432.2 feet to station 18; thence south 19 degrees 40 minutes, west 227.9 feet to station 19; thence south 30 degrees 8 minutes, west 618.6 feet to station 20; thence south 8 degrees 12 minutes, west 407.9 feet to station 21; and thence south 64 degrees 25 minutes, west 285.7 feet to station 22, at a dividing gate in said canal, which is the terminus of the said canal owned by the Defendant, the Provo Bench Canal and Irrigation Company, and which said canal is 9200 feet in length.

8th. That the Defendant, The North Union Irrigation Co., for the purpose of receiving water through the said canal above described and conveying the same from said canal above described and conveying the same from said terminus at station 22, and conveying the same over and upon Provo Bench, there to be used by its stockholders for irrigation and domestic purposes, acquired an easement and right of way about 10 feet wide and about 2 feet in depth carrying capacity over the following described course, to-wit:

Beginning at the said station 22 and running thence westerly and northwesterly, with such irregularity and variations as to require description thereof with traverse line and offsets as in the canal aforesaid, and running thence south 60 degrees 11 minutes, west 250.1 feet to station 23; thence north 77 degrees 1 minute, west 194.8 feet to station 24; thence north 52 degrees 26 minutes west 307 feet to station 25; thence north 73 degrees 3 minutes, west 457.6 feet to station 25; thence north 15 degrees 33 minutes, west 548.5 feet to station 27; thence north 46 degrees 12 minutes, west 523.5 feet to station 28; thence north 42 degrees 7 minutes, west 1012.8 feet to station 29; thence north 50 degrees 19 minutes, west 774.8 feet to station 30; and thence north 55 degrees 6 minutes, west 1326.6 feet to station 31, at which point the said lands to be irrigated by the waters of the Plaintiff are located.

9th. That the traverse line above given, and the offsets to the center of said canal are fully and accurately described in plat "A," attached to these findings and which for the purpose of the description of said canal are made a part hereof.

10th. Both of the said canals constitute a continuous waterway, The North Union Irrigation Company receiving from and through the Provo Bench Canal & Irrigation Company's canal, waters from Provo River to which it is entitled, and both of the said canals in their entire course are excavations and cuts and fills of earth and are such as to admit of enlargement and increased carrying capacity without detriment or injury thereto.

11th. That it is not feasible for the Plaintiff to construct a canal from Provo River out upon Provo Bench to his said lands, and the said arid lands where his water may be and will be used for irrigation purposes, and the cost of constructing a separate canal thereto would equal the value of the said water right.

12th. That neither of the Defendants own other than a
21 mere easement over the land through which their said canals extend, and the damage to said canals in the enlargement thereof by Plaintiff, to the extent hereinafter found necessary, and hereinafter decreed, would be nominal and is found by Court in favor of each of the Defendants in the sum of $1.00.

13th. That the said canals of the Defendants are irregular in their size, at some places being larger than necessary to carry the quantity of water of the Defendants, and at other places being limited in size so as to carry 125 second feet of water, which the Court finds the maximum carrying capacity of the Provo Bench Canal & Irrigation Company at its smallest places. The Court finds that no portion of the carrying capacity of the said canals of the Defendants is subject to condemnation, but that each of the Defendants is entitled to its full capacity, although there may be places in said canals, of greater capacity than others and in the enlargement, hereinafter decreed and authorized, the Plaintiff herein shall leave the said canals at all points of as great a capacity for carrying water, in excess of said enlargement, as now exists, so that the Defendants in the future, should they or either of them see fit to enlarge the carrying capacity of the said canals, may do so without enlarging the same throughout, but merely at points where said canals are contracted and have the least carrying capacity.

14th. It is further found by the Court, that the convenience of the Defendants require that the grade of the said canal shall not be altered, and that the enlargement, hereinafter authorized and decreed, shall not be made by excavation in the bottom of the said canal.

22 15th. It is further found that owing to the porous condition of the soil through which said canals extend at some points, that it will be necessary to have said enlargement done under a competent engineer, according to whose plans the work of enlargement shall conform; and that it will be necessary where the ground is broken by such enlargement, to puddle the surface of the ground, where such enlargement takes place, to guard from percolation and seepage, which portion of the work of the enlargement of the said canal shall also conform to the specifications and requirements of the engineer in charge of the work of enlargement.

16th. There being several methods by which the carrying capacity of the said canals may be increased, but the Court desiring, for the convenience of the Defendants, that such shall conform as far as practicable to the wishes of the Defendants, hereby find that the enlargement shall be made either by strengthening the banks of the said canals so as to carry in addition to the waters of the Defendants, ten second feet of the water of the Plaintiff or by excavating in the upper bank of the said canals and placing the material taken therefrom to the lower bank, thus adding the capacity for ten second feet of water to said canal by widening the same, or by either or both of said methods as elected by the Defendants, and in case of their refusal to make selection of the way that they wish to have said enlargement executed, then the plaintiff shall be entitled to enlarge said

canal to the extent of adding a carrying capacity of a flow of ten second feet thereto by increasing the width of said canal
23 sufficiently therefore by moving the material of the upper bank of said canals and placing it on the lower bank thereof, which said enlargement shall be made throughout and through the entire course of both canals as above described. The Plaintiff and the Defendants may select the engineer to take charge of the said work of enlargement, which engineer shall be paid for all services rendered by Plaintiff, and in the event of their failing to agree upon an engineer to take charge of said work of enlargement, the Plaintiff herein shall be responsible to the Defendants for the reasonable expenses of an engineer to represent the Defendants to inspect said work as it progresses, and in the event of such representative of the Defendants finding that the work of enlargement is being executed to the danger of the interests of the Defendants or in an improper manner, the Court retains jurisdiction herein by further order to control and direct the method and manner of said enlargement and completion thereof.

17th. The Court further finds that it will be necessary, in order to guard the interests of the Defendants and to protect them from loss or damage that may arise through an improper or defective enlargement of said canals, to require a bond from the Plaintiff in favor of the Defendants, jointly and severally, in the sum of ten thousand dollars, conditioned for the payment to the Defendants and each of them, of all damage and loss that may arise to them or either of them from said enlargement of the said canals, or in any manner accruing therefrom, and further conditioned for the payment by the plaintiff and his successors pro rata for the maintenance
24 of said canal and the controlling and regulating the water therein, which said bond shall be perpetual.

18th. The Court further finds that the Plaintiff, at his own cost, shall pay for all means and devices required for diverting said water into said canal and turning the same out of the said canal and dividing the same from the waters of the Defendants and shall be responsible to the Defendants for all cost of dividing the said waters from the waters of the defendants as well as turning the same into the said canals.

19th. The waters of the Plaintiff shall be controlled by the Defendants severally in their said several canals and the same shall be divided to the Plaintiff at the point where he takes the same from said canals, under the authority of the Defendants, and the cost and expense of such divisions and control shall be wholly by the Plaintiff.

20th. That the Plaintiff has a use for irrigation purposes of canal capacity sufficient to convey ten cubic feet of water per second of time, which use is a public one and such capacity may be added to the canals above described without injury to said canals or either of them.

21st. As conclusions of law from the foregoing facts, the Court hereby finds and decides:

1st. That the Plaintiff is taking no portion of the canals of the Defendants or either of them to or for his use.

2d. That the plaintiff is entitled to enlarge the said canals by adding 10 cubic feet of water per second of time, carrying capacity to each of the said canals and after such enlargement, flow
25 through the said canals a quantity of water not to exceed ten cubic feet per second of time and to draw from said canals such quantity of water as he may flow therein save and except such portion thereof as may be lost by seepage and evaporation.

3d. That the damage to the Defendants by such enlargement is nominal and found to be the sum of $1 to each of the Defendants, not determining however, any damage that may arise through improper execution of said enlargement and damages that may arise therefrom, which damages Defendants and each of them shall be held harmless from by the bond above referred to and hereinafter provided for by decree.

4th. The Plaintiff shall pay the costs of Court herein and each party to this suit shall pay the costs of his own witnesses.

5th. Said enlargement may be done at any time between the first day of October, 1908, and the first day of March, 1909, or the same interval of time any years hereafter, and judgment is hereby ordered to be entered accordingly.

Decree.

This cause having been brought on for hearing the 4th day of December A. D. 1908, upon the amended complaint of the Plaintiff and the answer thereto of the Defendants, and was tried by
26 the Court sitting without a jury and the Court having heard all the evidence of the parties hereto and considered the same and made its findings of fact and conclusion of law in writing as above set forth, from which it appears to the Court that the Plaintiff is entitled to the relief praved for in his complaint and all and singular the Court being fully advised in the premises as to the law and facts herein:

1. Now, therefore, on motion of D. D. Houtz, attorney for the Plaintiff, it is considered, ordered, adjudged and decreed that the canal of the Defendant, The Provo Bench Canal & Irrigation Company, and the canal of the Defendant, The North Union Irrigation Company, are subject to enlargement by the Plaintiff to the extent of adding thereto a carrying capacity of ten cubic feet of water per second of time, and that such enlargement may be made at any time between the 15th day of November, A. D. 1908, and the 15th day of March, A. D. 1909, or during the same interval of time any years hereafter, and the Plaintiff is hereby considered, adjudged and decreed the right and to be entitled to enlarge the said canals to the extent aforesaid, and after such enlargement to flow through the said canals a quantity of water not to exceed said ten cubic feet per second of time, and to receive from said canals such quantity of water as may flow therein less the quantity thereof lost in transit, and any rights or interests of the Defendants to the contrary are hereby adjudged condemned to the Plaintiff's use. Notwithstanding each of the said canals may be larger in places than required for

the use of the Defendants, no portion of the capacity thereof shall be appropriated by the Plaintiff, but the enlargement
27 hereby authorized, shall be made throughout the entire course of said canals, preserving to the Defendants and each of them the full capacity of the said canals as they now exist throughout their entire course and such enlargement shall be made in such manner as to preserve the margin of safety to the said canals at all points as it now exists.

2. The Court desiring to have said enlargement conform, as far as reasonable, to the wishes of the Defendants herein, provides that the Defendants may direct in writing filed with the clerk of the Court in this case within twenty days after notice of the entering of this decree, whether said enlargement of said canals shall be made by excavation from the upper bank thereof and placing the material excavated upon the lower banks of said canals or whether the banks of the said canals shall be raised and strengthened with borrowed earth to add said carrying capacity to the said canals in depth or whether such enlargement shall be made by both of said means, and the Plaintiff shall, in case such selection is made by the Defendants, execute said enlargement in accordance with said expressed wish in so far as the same shall be reasonable and necessary, and in case the same is made and deemed unreasonable and unnecessary by the Plaintiff, he may apply to the Court for a modification of said method of said enlargement for which purpose the Court retains jurisdiction herein, and in case of the refusal of the Defendants to make such selection, then the Plaintiff shall be entitled, and it is hereby ordered, adjudged and decreed to be entitled, to enlarge said canals to the extent aforesaid, by increasing the width thereof to the extent
28 necessary to add such capacity thereto, by removing material from the upper bank of said canals and placing it on the lower bank thereof.

3. In order that the enlargement of the said canals may be made efficient, properly and to the extent aforesaid, the Plaintiff and the Defendants may jointly select a competent engineer to supervise and direct the work of enlargement, who shall be paid for his service by the Plaintiff, and according to such engineer's directions the said work shall be performed, and in the event of their failing to so agree in the selection of an engineer, then the Plaintiff shall pay the reasonable expenses of an engineer to represent the Defendants in the inspection of said work of enlargement as it progresses and should such representative of the Defendants find said work of enlargement being executed in a manner insufficient or dangerous to the interests of the Defendants, a report thereof may be made to the Court upon the filing of which *a* notice thereof, said work shall be suspended until further order*ed* herein to make which the Court retains jurisdiction.

4. It is further ordered, adjudged and decreed that wherever the water surface of the said canal- is broken or made of new earth and the material that would be exposed to the water is of a character to allow loss by seepage or percolation, the same shall be properly sealed

by puddling or other means, so as to avoid loss through seepage in the flow of water through the said canals.

5. It is further ordered, adjudged and decreed that the waters of the Plaintiff turned into the said canal- after the said enlarge-
29 ment, shall be controlled by the Defendants at the expense of the Plaintiff, and that the Plaintiff shall pay all costs of all devices and means made necessary for diverting the said added amount of water into the said canals and all devices, gates and means of dividing said water and measuring the same out of the said canal shall pay pro rata the costs and expenses of maintaining said canals in the proportion that ten second feet of water bears to the carrying capacity of the said several canals.

6. It is further ordered, adjudged and decreed that the Plaintiff, before entering upon work of enlargement, execute and file in this cause in the above named Court, a good and sufficient bond in the penal sum of fifteen thousand dollars, to be approved by the clerk of said Court, in favor of the Defendants jointly and severally, conditioned for the execution of said work of enlargement in such manner as to add ten second feet carrying capacity to each of the said canals without injury to the said canals and so to maintain the same with their present margin of safety and in as an impervious state to water as they are at the present time, and conditioned for the payment of all damages that may arise to the Defendants or either of them through any failure to execute said enlargement in manner aforesaid, and conditioned for the payment to the Defendants and each of them, of all damages which may be done to them or any other person for which they may be responsible, arising out of the enlargement of said canals by the Plaintiff, and further conditioned that the Plaintiff will pay all costs and expenses of controlling, regulating and dividing his water as aforesaid by the Defendants and his
30 pro rata costs and expenses of maintaining the said canals as hereinbefore decreed and determined. The said bond shall be perpetual and a condition precedent to the right of the Plaintiff to enlarge said canals, and precedent to the right of the Plaintiff and his successors in title to flow water therein.

7. It is further ordered, adjudged and decreed that the damages to the Defendants and each of them, except such as may arise through defective or insufficient enlargement of the said canals, are nominal, and are adjudged in favor of each of the Defendants in the sum of one dollar, and further damages are provided for with the bond aforesaid.

The canals of the Defendants hereby authorized to be enlarged are one continuous waterway and are described as follows:

That of the Defendant, The Provo Bench Canal & Irrigation Company, which is 16 feet wide, with a carrying capacity of about 2½ feet in depth of water, with a maximum carrying capacity of 125 cubic feet of water per second of time, beginning at a point near the mouth of Provo Canyon, Utah County, State of Utah, which is 2155 feet south, 9 degrees 57 minutes east from the northeast corner of section 12, Tp. 6 S. R. 2 E., Salt Lake Meridian and running thence southwesterly with such variations and irregularities as to

render description thereof by traverse line necessary with offsets to the canal, which offsets extend from said traverse line to the center of the canal, which said traverse line is described as follows, to-wit:

Commencing at the point aforesaid, which is known as station 0, and running thence south 20 degrees, west 133 feet to
31 station 1, thence south 17 degrees 16 minutes, west 354 feet to station 2, thence south 32 degrees 33 minutes, west 194.1 feet to station 3; thence south 77 degrees 4 minutes, west 749.4 feet to station 4; thence south 22 degrees 14 minutes, west 688.5 feet to station 5; thence south 27 degrees 4 minutes, west 503 feet to station 6; thence south 44 degrees 20 minutes, west 495.6 feet, to station 7; thence south 19 degrees 35 minutes, west 495.6 feet to station 8; thence south 25 degrees 56 minutes, west 600.9 feet to station 9; thence south 20 degrees 50 minutes, west 415.6 feet to station 10; thence south 5 degrees 7 minutes, west 434.4 feet to station 11; thence south 32 degrees 1 minute, west 467.4 feet to station 12; thence south 34 degrees 53 minutes, west 179 feet to station 13; thence south 2 degrees 6 minutes, west 291.7 feet to station 14; thence north 16 degrees 56 minutes, east 400.6 feet to station 15; thence south 13 degrees 7 minutes, west 393 feet to station 16; thence south 4 degrees 40 minutes, west 284.1 feet to station 17; thence south 25 degrees 3 minutes, west 432.2 feet to station 18; thence south 19 degrees 40 minutes, west 227.9 feet to station 19; thence south 30 degrees 8 minutes, west 618.6 feet to station 20; thence south 8 degrees 12 minutes, west 407.9 feet to station 21; and thence south 64 degrees 26 minutes, west 285.7 feet to station 22, at a dividing gate in said canal, which is the terminus of the said canal owned by the Defendant, the Provo Bench Canal & Irrigation Company, and which said canal is 9,200 feet in length. A more particular description of the said canal traverse line and offsets being given in plat "A," in the above Findings of Fact, which plat is hereby referred to for description and made a part of this decree, and—

32 That of the Defendant, The North Union Irrigation Company, which is a canal ten feet in width with a carrying capacity of two feet in depth of water, which begins at station 22 of the canal of the Defendant, The Provo Bench Canal & Irrigation Company, and running thence westerly and northwesterly with such irregularities and variations as to require a description thereof with traverse line and offsets as in the canal aforesaid necessary, and running thence south 60 degrees 11 minutes, west 250.1 feet to station 23; thence north 77 degrees 1 minute, west 194.8 feet to station 24; thence north 52 degrees 26 minutes, west 307 feet to station 25; thence north 73 degrees 3 minutes, west 457.6 feet to station 26; thence north 15 degrees 33 minutes, west 548.5 feet to station 27; thence north 46 degrees 12 minutes, west 523.5 feet to station 28; thence north 42 degrees 7 minutes, west 1,012.8 feet to station 29; thence north 50 degrees 19 minutes, west 774.8 feet to station 30; and thence north 55 degrees 6 minutes, west 1,326.3 feet to station 31. A more particular description of the said canal traverse lines and offsets being given in plat "A" in the above Findings of Fact,

which plat is hereby referred to for description and made a part of this decree.

It is further ordered, adjudged and decreed that the Plaintiff pay all the costs herein.

The bond hereinbefore required by this decree, may be changed in the amount thereof upon motion with notice to the adverse party, upon sufficient showing of necessity for such change, and the
33 Court retains jurisdiction to make further order respecting said bond.

JOHN F. CHIDESTER,
Presiding Judge.

Done in open court this 19th day of January, A. D. 1909.

(Title of Court and Cause.)

Defendants' Bill of Exceptions.

The Court having made and entered its Findings of Facts, Conclusions of Law and Decree in said cause, and having filed the same on the 19th day of January, 1909; and the Plaintiff's counsel having served notice of the filing of the Findings of Fact and Decree in said cause on the 27th day of January, 1909, the Defendants, on the 30th day of January, 1909, served upon the Plaintiff, and on February 1, 1909, duly filed in said Court their notice of intention to move for a new trial in the language following, to-wit:

(Title of Court and Cause.)

Motion for New Trial.

To the above named plaintiff and to D. D. Houtz, his attorney:

You and each of you will take notice that the Defendants named in the above entitled action intend to move the Court to
34 vacate and set aside its Findings of Fact, Conclusions of Law and Decree in said cause, and to grant a new trial of said cause, on the following grounds, to-wit:

I.

Insufficiency of the evidence to justify the Findings of Fact, Conclusions of Law and the Decree.

II.

That said Findings of Facts, Conclusions of Law and Decree are against law.

III.

Errors in law occurring at the trial and excepted to by the Defendants.

Said motion will be made upon the minutes of the Court.
Dated this 30th day of January, 1909.

(Signed) J. W. N. WHITECOTTON,
S. R. THURMAN,
Attorneys for Defendants.

Due service of the foregoing notice is hereby admitted by receipt of copy thereof, this 30th day of January, 1909.

(Signed) D. D. HOUTZ,
Attorney for Plaintiff.

The said motion for a new trial having been submitted to
35 the Court without argument was by an order of the said Court overruled, said order being filed in Court on the 20th day of December, 1909, and the notice thereof having been served upon the Defendants by the Plaintiff on the 23d day of December, 1909, to which order overruling said motion the Defendants then and there duly excepted.

On the 13th day of January, 1910, the Court entered an order granting the Defendants to the 31st day of March, 1910, in which to prepare, serve and file bill of exceptions.

On the 14th day of March, 1910, the Court duly entered an order extending Defendants' time for preparing, serving and filing bill of exceptions in said cause to and including the 30th day of April, 1910.

On the 23d day of April, 1910, the Court duly entered its order granting Defendants additional time to and including the 25th day of May, 1910, for preparing, serving and filing bill of exceptions in said cause.

On the 21st day of May, 1910, the Court duly entered its order granting to the Defendants until and including the 10th day of June, 1910, in which to prepare, serve and file their bill of exceptions on appeal.

Evidence.

Decrees of Court and Conveyances to Plaintiff showing him to be entitled to about two second feet of the waters of Provo River, six to eight miles above the mouth of Provo Canyon, where it is
36 sought to turn the Plaintiff's water into Defendants' canal, see evidence occupying pages 9 to 23 of the transcript, and about which no question is made at this time.

Pages 23 to 33 of transcript are occupied with testimony of Freeman Tanner, a witness called for Plaintiff, in respect to the map appearing as an exhibit to the complaint, upon which there is no question made.

CALEB TANNER, Plaintiff, being sworn, testifies as follows:

I have been acquainted with Defendants' canal ever since I was a boy. The canal throughout is through gravelly country. At the upper end, near the mouth of the canyon, the slopes are rather

level for a few hundred feet from its point of diversion. The country adjacent to the canal is rather level, and then proceeds for about a mile along the sidehill of the gravelly pitch that slopes rather steeply toward the east, after it mounts the bench completely. It continues then across the bench, and is rather level. The canal is much steeper in its upper portion than in the middle portion.

The capacity of the upper portion is therefore greater—will carry more water. The canal is not regularly graded. Proceeding from the point of diversion the canal falls with a fairly uniform grade, especially for six or seven hundred feet. It continues thence on a much less grade, approximately half as much, for about a thousand feet, and then a grade intermediate the other two, and throughout the canal shows irregularities.

The irregularity in the grade would materially lessen the carrying capacity of the canal.

37 The carrying capacity of Provo Bench Canal to the junction with the North Union Canal, would be, roughly, 110 to 115 cubic feet per second. I measured it a number of years ago, but not within the last two or three years.

The width is approximately 16 feet. In some places the water is more than three feet deep, and in shallow places about two and a half feet. The shallow places are where the grade is steep. Put on a uniform grade the canal's carrying capacity would be increased about 25 second feet. It is practicable to take out that material and place the canal back in as good condition as to holding water as it now is in. No one, of course, can be absolutely certain what would develop in the course of the excavation of the bottom of that canal. Assuming that throughout the excavated zone there would develop very porous, open substrata, it would be necessary to cover that substratum up with water-holding material—to puddle the bottom of the canal. That would make the canal better for holding water than it is now. In my judgment that could be done without detriment to the canal. In my judgment it would improve the canal in its water-carrying construction. If the Court should permit me to enter the Defendants' canal, I am willing to do such work as the Court may direct, and put the canal in absolutely safe condition, regardless of the cost. The North Union Canal is a better graded canal than the Provo Bench Canal, but there are some irregularities in it. To equalize the grade in it would increase its capacity about ten second feet. The soil is sandy loam in some places and gravelly loam in others. I think there would be much less loss and much less danger to this canal than to the Provo Bench Canal.

38 The Provo Bench Canal runs along a sidehill most of the way, so that its left bank is down hill.

In my judgment there are two ways in which this canal can be enlarged without doing any injury; first, by taking the material out of the bottom; and second, by raising the left bank and putting down from the surface of the bank, down to the maximum level, as it has heretofore been used, a puddle wall; then no material would need to be disturbed in the canal, and there would be no additional leakage to the left bank. There would, however be in all probability,

a little loss on the right bank, and over some section that is so steep that it is rather difficult to puddle. I would not disturb the upper bank at all. You can't put down a puddled wall on the right bank at all.

Cross-examination:

I made the survey in 1907, after the irrigation season had closed. The canal is cleaned out by the owners in the spring of the year, and this survey was made after such sediment and debris had accumulated in the bottom of the canal as would accumulate for the year. The profile on the board represents 14,200 feet.

I have estimated the probable cost of excavating and back-filling, in making the alteration in the canal, at 75 cents a yard for the material handled.

39 Redirect examination:

I estimate the cost to be about two thousand dollars. I am acquainted on the bench, and there is arid land there. I have applications for the water I propose to take out there. Some of the land is used for fruit. A second foot will irrigate approximately 100 acres.

The water would be worth approximately seventy-five dollars an acre.

I have surveyed the canal at other seasons of the year, and the result was practically the same. The canal was in good condition.

WALTER W. MCLAUGHLIN, being sworn, testified on behalf of Plaintiff, as follows:

I am a civil and irrigation engineer and have been engaged in practical work twelve years. I am connected with the Utah Experiment Station. I examine canals to ascertain their ability to carry water without loss.

I am acquainted with the canals involved in this suit. I examined them this summer. I found the material to be porous and gravelly, with some sand here and there on the benches—ordinary bench sand hill soil. I should judge removing the material as indicated by the profile would increase the carrying capacity of the canal eight or ten second feet.

The material could be removed and the canal rebuilt on a uniform grade and be as good as it is now. One way of doing the work is to haul material in there by wheel scrapers or wagons, and the traveling back and forth is calculated to puddle the materials and make
40 them impervious to water. I think it would be as good if not better after this had been done. I followed and examined practically the whole canal.

There are two methods of enlarging the canal. One is by excavating the bottom and such back filling as might be necessary. The other method would be by building up the lower bank with some kind of puddle wall, raising the height of the water in the canal without disturbing the bottom or the natural bank. It is hard to

say which is the better way. If it were done under competent supervision I would have very little choice from the standpoint of safety to the canal.

Cross-examination:

When I examined these canals there was water in them. I could observe the condition of the bottom somewhat. I saw the canal in Logan Canyon broken up and repuddled. The maximum capacity of that canal is 120 feet. One method of puddling was by hauling in clay. Another was by throwing clay into the canal while full of water, trusting to the puddling action of the water itself. I do not know how long it may have taken to puddle the two canals involved here, but under proper supervision I should not hesitate to have it broken up, if it were mine.

I examined these canals but once.

I spent between four and six hours in my examination. I judge the canal was half full of water at the time.

W. B. SEARLE, sworn for Plaintiff, testified as follows:

41 I am 47 years old and reside at Provo. I am a civil engineer. I have had something to do with irrigation. I am acquainted with Provo Bench Canal and North Union Canal, and have been for about 18 years. I have made observations and measurements and am acquainted with the country over which they pass. I understand what the lines on the profile indicate.

I have never run a level line on the canal. I have observed conditions; the velocity in the canal, the difference in velocity, which is probably due to the irregularity of grade. I should judge that making the grade uniform would increase the carrying capacity twelve or fourteen per cent.

I am of the opinion that it is entirely feasible to increase the carrying capacity of the canals by reducing them to a uniform grade, with safety and without injury to the canal. It would increase percolation to take up the bottom, unless care were taken to puddle the portions that are very porous. Puddling with clay or some other impervious substance. The canal would then be in better condition than it is now. My impression is the bottom of the canal probably hasn't the resistance that the clay would have and such stuff.

CALEB TANNER, Plaintiff, recalled, testified:

I have 168 minute feet of water, and have no way now that the water can be taken out on the bench.

There is no other canal and no other way that it can be gotten out on the bench except through the canal that is owned by the Provo Bench Canal Company. It would be a very expensive

42 and difficult undertaking to build an independent canal to carry this water into the bench. In low water all the Provo River comes down through the Telluride Power system and comes out through their wheel at an elevation that would make an independent canal follow practically the same alignment and grade as the present Provo Bench Canal Company, and from an engineering

point of view it is impractical to construct such an independent canal. If I attempted to spill the water over the Telluride dam there would be stretches of the Provo River bed in low water season that would be bare of water, and the small amount of water that I have would be wasted in the bottom of the river bed, as it would have to proceed over these barren stretches alone. The way to get the water from its present place of use to its new place of use, as I desire it, is to keep it in the same place, where the large body of water now goes, and that is through the Provo Bench Canal. The cost of constructing an independent canal would be far in excess of the value of the water when I got it there.

I have a small place where I could use this water in the South Fork, but there is not any other place where I could use the majority of the water. I acquired the water from the real estate. When I bought this water originally I acquired an option on 200 acres of dry land. I attempted then to get the consent of the company to permit me to take the water through their canal and encountered a great deal of difficulty and opposition. The option on that land was too expensive to maintain, and I had to permit it to lapse, but there is still a considerable body of that 200 acres arid; and there is a
43 great deal of other land in that vicinity that is arid. There is a great demand for water out there for irrigating land that is not fertile without irrigation. In the high water season Provo River has flowed as high as three thousand cubic feet per second. The amount of water in the canal in high water season is approximately four hundred feet.

Over Defendants' objection and exception the Court received in evidence an application made by John D. Dixon to the Plaintiff herein as State Engineer, by which said Dixon purports to claim to appropriate 2,080 acres of land. In addition to the regular statements in the application, the following is contained:

The following additional facts are set forth in order to more clearly define the full purpose of the proposed appropriation: The applicant intends to enlarge the Provo Bench Canal to the dimensions heretofore given, so that in addition to its present carrying capacity the canal will carry the water applied for by this applicant. The water applied for will be used as a supplementary supply on part of the land described. It is the intention of all the applicants that the total quantity of water from all sources will not exceed one second foot of water for 70 acres of land irrigated. The document was filed in the office of the State Engineer. Plaintiff herein, on October 27, 1908, nearly ten months after the complaint in this action was filed, which was January 6th, 1908.

Defendants' objection to this evidence was based upon the ground that it was irrevelant, not being within any issue involved in the case.

44 JOHN D. DIXON, being sworn, testified in behalf of Plaintiff as follows: I reside in Provo. At the time that application was made I had made arrangements with Mr. Tanner that if my application was allowed by him I would transfer the water to him. The arrangements were not reduced to writing; they were verbal. The arrangement was as soon as I got this application I would turn it over to Mr. Tanner. I am going to do it in case it is approved.

CALEB TANNER, Plaintiff, recalled, testified:
I heard the application of Mr. Dixon read. I had an arrangement made with him in relation to the water. I intend to use the water in Mr. Dixon's application to fill part of the space of the enlargement, if I am permitted to make the enlargement.

Cross-examination:

I had such an arrangement with Mr. Dixon as he testified to. He was to make application to me as State Engineer, and after the application was allowed, he would transfer the water to me if I was still the owner of this right. I made that arrangement with him in advance. He was interested with me in it.
I think it might, and probably would, cost as much to build an independent canal capable of carrying ten second feet of water as it cost to build the Provo Bench Canal. I should say—ten thousand dollars.

45 Over defendants' objection that it is irrevelant, the court received in evidence proof of publication of Mr. Dixon's notice of his application as it appears above, to which Defendants excepted.

CALEB TANNER, Plaintiff recalled, testified that no protest against the application of Mr. Dixon had been filed, and that the time of publication was up.

HYRUM F. THOMAS, a witness called and sworn for Plaintiff, testified as follows:
I reside at Provo. I am water commissioner of Provo River, by the appointment of the court under the provisions of a decree of the court. I am acquainted with the Provo Bench Canal. I have measured the canal several times at nearly all seasons to ascertain its carrying capacity. I have the measurement for June 6th, 1905, when it was estimated to be full, and it had 123.62 second feet or 7417.2 minute feet. My estimate is that it will carry 125 second feet.

WALTER W. MCLAUGHLIN, recalled, testified: I have made a computation to increase the carrying capacity of the canal by putting it on a uniform grade, and find that putting it on a uniform grade would increase its capacity about twelve per cent. I think there is not much choice between enlarging the canal's capacity by reducing the grade to uniform condition and building up and strengthening

the lower bank. If I had a choice I think I should prefer the latter method. I think that method could be followed with equally as great safety. To increase the capacity by this means as much as twelve per cent would require raising the depth of the water between two and three inches, assuming the canal is twenty feet wide.

CALEB TANNER, Plaintiff, recalled, testified: I am ac-
46 quainted with the waters of Provo River. South Fork is a branch of Provo River. Its waters flows down by the mouth of the Big Bench Canal. I know where Hoover's land is and the spring on it. When unobstructed the spring flows into Provo River and down *the* past the canal of the Defendant.

Plaintiff rests.

Mr. WHITECOTTON: The Defendants in this case now move the Court to grant a non-suit in this case on the following grounds:

First. The Plaintigg having alleged in his complaint, upon which this case is tried, that through the appropriation of himself and his predecessors in interest and grantors, he is the owner of ten second feet of water from Provo River and is entitled to divert that water from said river at the mouth of Provo Canyon, he has failed utterly to sustain his allegation that he is the owner of, or that he has the right to divert any water whatever from the said river at the mouth of Provo Canyon, or at any other place that the point of use by his predecessors in interest. So that the Defendants say that the Plaintiff has failed to bring himself by his proof within the class of persons who are entitled under the statute governing this proposition to the relief prayed for in this complaint.

Second. The evidence in this case shows that the plaintiff has succeeded to certain rights decreed by this Court to belong to one James H. Snyder, and one Joshua J. Mecham, but the decree by which these rights were established and, as we take it, through which the Plaintiff here must claim, does not award any rights to the
47 parties to take water from Provo River at any other place than those specified in the decree, and the decree provides that James H. Snyder is the owner and entitled to the use of forty minut- feet of Class A water to be taken from the South Fork of said river; that Joshua J. Mecham is the owner and entitled to the use of 20 minute feet of Class A water to be taken from the south fork of said river and that John W. Hoover is the owner and entitled to the use of 114 minute feet of Class A water, which shall consist of all spring water heretofore and hereafter to be used by him, and sufficient water from the river, which, together with said spring water will aggregate said amount.

Third. The evidence introduced here in respect to some application for the appropriation of water, now that it is in, and the conditions under which it came into existence have been disclosed, fails as yet to establish any right whatever in this Plaintiff. It does disclose an agreement entered into orally between the applicant, Mr. Dixon, and the officer whose duty it is to grant the application under

certain conditions whereby the official who is charged with the trust of disposing of this property expects to become the beneficiary of that grant, in case it be not opposed by anybody and defeated. The evidence here of that proceeding in itself shows that the last publication of the notice of that application was made on the 28th day of November, and under the law anybody who may have a reason for opposing that application or protesting against it, will have until the 28th day of this month to file an objection to the allowance of it, so that it does not form the basis of any claim of a right to water. It is not within the issues of the case that we
48 have presented, and therefore it ought not to be considered by the Court for the reason that it is not a part of the case on trial. Another reason why it ought not to be considered by the Court is the character of the claim made under this proceeding. We find here an agreement entered into by the state officer who is charged with the allowance of applications for the public waters of the state, an agreement entered into between this applicant and the official who will pass upon it, that the applicant shall make the application and procure the allowance, and then will transfer it to the officer who makes the allowance. It would seem as if in a government such as we profess a proceeding of that kind would have no standing in a court of justice. The law is so well settled that no right can spring from the action of any person who judges his own case, that it has been held by the highest court in England that an act of Parliament permitting a man to judge his own case would be null and void, and, therefore, we say that such conduct as this ought not to find a place as evidence in a court of justice, and ought to be ignored by the Court in passing upon an issue presented.

So that we are left here without any evidence of any right in this Plaintiff beyond the rights that came to him as the successor of the beneficiaries of the decree referred to, and in those rights he has not shown and has not undertaken to show that he may divert the water of this river at the point at which he now asks to do it. I take it that it will not be permitted to an individual applicant to come into such a canal as the Plaintiff's own testimony shows the canal
49 of the Defendant's to be, and disturb it unless a cogent reason be shown. He must show, in the first place, that he has a right that he can enforce, so that if he obtain from this Court an order to break up this canal, it will not be a mere idle pastime, but there must be some assurance that he can and will put water into it. The court will not permit property to be encroached upon as a mere experiment, but the Plaintiff must come here and show that he has something that demands an entrance into this canal at the point in question, and that he has utterly failed to do.

The Defendants' motion for a nonsuit was overruled by the Court, to which ruling the Defendants then and there duly excepted.

CALEB TANNER, recalled for Plaintiff, testified: I am familiar with the South Fork of Provo River. Its entrance into Provo River proper is, some of it three miles and some of it four miles, above where I wish to divert this water into the Provo Bench Canal. The mouth of South Fork is about five miles about the mouth of Provo Bench Canal. From the mouth of South Fork to where Mr. Mecham and Mr. Snyder used this water, which I purchased, is about three miles to the Mecham place and about four miles to the Snyder place. The South Fork is a continued flow of water. In the spring of the year it approximates fifty second feet of water; shrinks from that to twelve or fifteen where it enters the river. There is always a flow from South Fork into Provo River, in addition to what is taken out for irrigation. It is a steep channel. The stream
50 increases as you go down from the Snyder place down to the mouth of the fork. There is considerable more water in the fork at the entrance of the river than there is at the Snyder and Mecham places. The Hoover place is probably three miles above the mouth of the fork, on the main river—probably more than that. There is a constant flow of water down the river. Some parts of the year more than two thousand second feet of water flow past the Hoover place. It falls from that maximum to one hundred and fifty second feet in summer time. I am acquainted with the conditions of the river. Wherever I have had occasion to make any determinations along that line it shows an increase of water down to a place two-fifths of a mile above where I wish to *direct* my water.

All the waters of Provo River in low water season are taken out by the Telluride Power Company, approximately three miles above the mouth of the Provo Bench Canal. It is taken out in a flume. The tail race of the Telluride Power Company is the intake of the Provo Bench Canal. It is a very excellent waterway—very little loss—one-tenth of one per cent would doubtless cover it. After the Telluride Company takes out all the water, there is water rising in the old channel lower down. I have measured that and found an increase.

On one occasion when the Telluride was diverting all the river so that none was spilled over its diverting dam, in the neighborhood of five hundred feet below the dam the river was increased and there was nine cubic feet per second. From the mouth of South Fork to where I desire to divert my water, there is practically no
51 irrigating done. The canyon is a rugged gorge. In my judgment the water increases as it comes down. In my judgment if my water were turned into the river none of it would be lost by seepage.

Cross-examination:

The increase of water is due to the natural run-off—sub-surface run-off from the adjacent mountains. There are springs and some natural tributaries. The Mecham land lies right along the creek; right along the river. There would be a run-off into the creek from irrigation. Some of Snyder's irrigation is along the creek, too. The Hoover land is also close to the river. At least some of it has a run-off into the river.

W. B. SEARLE, a witness for Plaintiff, recalled by Plaintiff, testified:

I am acquainted with the natural channel of Provo River from the Big Bench Canal up to the H over place. I have known it seventeen or eighteen years. I am acquainted with South Fork. If water were added to the waters of Provo River at the Hoover place I do not think any of it would be lost in coming down the canyon to the mouth of Provo Bench Canal because the river itself is continually increasing its flow from the springs, both in the river bed and slightly above it—on the sides of the mountain. I do not believe there is a mile of that distance that does not offer some increase of water to Provo River.

52 Cross-examination:

There is loss of water by evaporation, certainly.

Whatever increase there is is not because this South Fork water assembles itself, but because of new supplies coming in. The same thing is true as to the Hoover water.

Plaintiff rests again.

Defendants' Case.

Thereupon the Defendants to maintain the issues upon their behalf offered and introduced the following evidence:

H. J. W. GODDARD, being first duly sworn, testified as follows:

I have lived in Provo City fifty years and am a farmer. I have always farmed by irrigation. I am acquainted with Provo River, including South Fork. I am acquainted with the Joshua Mecham and James H. Snyler lands *in* the South Fork, and have made examinations of the conditions there as to the flow of water in the creek when the Snyder and Mecham lands have been under irrigation in the latter part of June and first of July. The Mecham land lies right adjacent to the creek and is sloping—slopes towards the creek and also down the canyon. The water was running on this land for irrigation when I was there. The water was running off into the creek. I was a member of the city council of Provo City,

53 and a member of the irrigation committee, and as such I was sent up there for the purpose of investigating the condition of the water and the uses made of it.

I should judge there would be close to one-half the water come back into the creek from surface overflow and percolation seepage. That part of the Snyder land that was close to the creek would be about the same. I should judge no water would run off the bench land—only seepage. From the situation there, I should judge a portion of the seepage and springs below the Snyder land came back from irrigating that land.

I am acquainted with what is known as the John W. Hoover place on the main river. I went there and made an examination. I found that the water used on that land for irrigation comes back

in seepage except in one or two places; then it is the surface water running off. It is more flat and level than South Fork. The soil is very porous, being a sandy loam. I should judge one-half of the water put on the Hoover land for irrigation finds its way back into the stream.

Cross-examination:

I base my judgment that half the water comes back upon general observation. Saw springs along the edge of the bench and the creek. Water was running out where the land had slipped. Take it all along I should say it was several minute feet. It was in July. Pretty much all of Snyder's land is under cultivation, but I do not know the number of acres.

54 JAMES GRAY, a witness sworn for the Defendants, testified as follows:

I live in Provo and have been a farmer forty years in this neighborhood. I am acquainted with Provo River and with the South Fork and with the land of Mecham and Snyder. I have been upon that land when it was irrigated, and observed the lay of the land. It slopes down the canyon and towards the creek.

I made observations so as to be able to state about what proportion of the water that was put upon the land ran off and came back into the stream. I was on a committee looking after the water for Provo City and the different canal companies. I believe as near as I could tell, one-third to one-half would go back from that ground.

The Mecham land lies along by the creek, sloping to the creek. The Snyder land lies a little farther back on the bench; it slopes towards the creek. The lower end of it comes down to the creek. I am acquainted with the John W. Hooper place and went over it when it was being irrigated. I made observations to ascertain what proportion of the water went back into the river, and believe most of that water would go back into the river, only what evaporates. My judgment is based on observation.

Cross-examination:

My observation was looking over it. Saw the amount of water that was there. Saw what was going off and saw what water was held there. I think this seepage goes into the river all the
55 year round, whether he irrigates or not. When he floods it, of course that comes back into the river ag-in. When he holds the spring back, that seeps back.

I do not know what part of the seepage water there comes from the springs that he did not use for irrigation at all. My judgment that one-half of the water comes back into the stream is based upon my belief and a guess. It is close to the river.

JOSHUA V. JONES, a witness, sworn for defendants, testified as follows:

I live in Provo. I followed farming in this community twenty years. I farmed irrigated lands. I was fish and game commissioner in this county for four years, which required me to go up and down Provo River and all its tributaries. I am familiar with the Joshua Mecham land, and have seen it under irrigation. From what I saw there, I should say that from one-third to two-fifths of the water comes back into the stream. I never made any measurements. I base my judgment upon my experience in irrigation and observation. I am acquainted with the John W. Hoover land, and have observed it under irrigation, and am of the opinion that the result is about the same as in the case of the Mecham land.

ROBERT THORN, sworn for Defendants, testified: I live in Pleasant Grove and have farmed in this county forty to fifty years. I am a stockholder in Provo Bench Canal Company. I am acquainted with Provo River, including South Fork. I know the Joshua Mecham and James H. Snyder lands—have been on them.
56 I was a member of the committee with Mr. Goddard and Mr. Gray to investigate the water situation.

I saw those lands under irrigation. I observed the conditions, and it is my judgment that from one-third to one-half of the water turned on these lands came back into the river. I am acquainted with the John W. Hoover land also. I should judge about one-third of the water turned on that comes back into the river.

Cross-examination:

I think I was at this place three times in different years. I made observations—went there to examine the seepage—and to find out where our water was. We went on the land up the river and would stop and make our observations. We drove down through Mr. Hoover's field, towards the west end. I formed my judgment then and through other observations.

I think there are in the neighborhood of seventy-five acres of land irrigated in the South Fork. That is high land way up in the mountains.

WILLIAM ERCANBACK, sworn on behalf of the Defendants, testified as follows: I live in Provo and own land in South Fork of Provo Canyon. I irrigate some of it. I know the Mecham and Snyder lands. Our land and the Mecham land have about the same soil.

Where I have been irrigating our land it is rather steep, and where I have turned water on it, it may be a quarter of a mile, and
57 I have walked up to the spring and back, which would take me about a half hour. I would come back and find water had been coming out down close to the creek. There is no doubt but it was the same that had been turned on above.

My land is steeper there than the Mecham or Snyder land, but

it looked to me as if after we got the water spread over the land, nearly all of it ran back into the creek again.

JAMES A. LOVELESS, a witness sworn on behalf of the Defendants, testified: I am one of the stockholders in the Provo Bench Canal. I became interested in the canal in the year 1876 and did my first work on it then. A small canal that had been constructed before that time. I am acquainted with the canal as it now exists and with the character of the soil through which it runs. It is porous; at the upper end it is gravel for about twenty rods. The next twenty rods is clay with seams or cracks across it. The next section was very rough—large boulders—not much soil in it—mostly large boulders. A little further down you come to cement. Where the cement is solid it holds water first rate. Below the cement is sand and gravel. When we got farther down we struck clean sand, which does not hold water until it has been tamped in. In 1878 the canal was completed practically as it is today. It was enlarged that year.

When we enlarged the canal we did not break up the bottom. We made a new bottom. We made the bottom tight by means of clay, which was hauled and tamped in with tamping sticks.

The sides were porous, too. We had to tamp it time and
58 again. There are places that have not yet been made so they do not leak—just one or two places now. We have been ever since 1878 overcoming the leaks. It was fifteen to eighteen years before we got that canal so it was practically impervious to water. There are farms lying along under the canal.

If the canal broke and ran down onto a fruit farm, or any cultivated farm or building, it would ruin it. The full capacity of the canal is above seventy-five hundred minute feet of water. We keep a constant watch on the canal, and it is necessary.

In my judgment the effect of breaking up that canal now and lowering the bottom of it four to six inches would be to make it like it was before. We lost nearly one-fourth of our water for a number of years. The part we did not disturb was all right.

The hillside was the hardest place we had to puddle. It took the longest to get the water stopped there.

Cross-examination:

The canal would not carry the water in 1878 that it carries now. We turned in as much water at the head, but we never got as much out of the bottom. We get more water now because we have improved the canal. The upper bank keeps sliding in and we have to clean out the canal.

We never have used a plow and scraper where the canal was pud-
dled. We have done plowing where there is much material
59 fallen down—in the big breaks. I have seen plowing done there where the bank is perpendicular and the gravel fell in there until it filled the canal up. We plowed and scraped that out. Occasionally the sediment settled in the canal and we took one horse and a plow and loosen- it up so we could shovel it out, but as for plowing and scraping, it has not been done to my knowledge ex-

cept this one place. Provo River carries down a good deal of silt, and that floods our canal so that we have to clean it out every spring. It will fill up the canal on one side and wash it out on the other, and it would do this if the canal had a uniform grade. There are willows growing along the bank.

There is not enough of our Class A water to fill our canal in the low water season. When we get down low enough, we have a whole lot of canal space to spare.

To have other water flow into our canal at the low season, if no disturbance were made in the distribution of the water but the turning of it out were left to us, to be turned out at the expense of the party who put it in would really help us. If the canal were made larger, so as to carry the high water, if it were put under our control and we were paid for dividing it, and we — put to absolutely no expense at all, it would not be any detriment to us, except that the foundation of our canal is such that I believe you could overload it until it would give out.

T. J. PATTEN, a witness sworn for Defendants, testified: I live on Provo Bench, and have since 1870. I have been a stockholder in Provo Bench Canal since 1865. I helped build it. I am acquainted with the soil through which it is built. I heard Mr. Loveless'
60 testimony in relation to the character of the soil and that is correct, only he did not tell it all. Puddling the canal was a very hard job. When the canal was first made it took two years—two summers' work—to get the water onto the bench after the canal was finished twelve feet wide on the bottom. This difficulty was due to the porousness of the soil. Quicksand was the worst; there was a good deal of it.

When we clean out the canal, we clean out what falls in and lodges on top of the bottom. If such breaks should occur now, since the land below is cultivated, as occurred formerly, with a full head on, it would break Provo Bench up—we would lose our crops and it would flood below tremendously. The bottom of that canal could not be safely broken up and the risk of new puddling taken with safety to the farms lying under the canal.

We have a great deal of fruit on the bench. If there should be a break right in the irrigation season, when the canal is full, it would be almost irreparable. It would wash a hole here for half a mile. It would cover the people below with rock.

Cross-examination:

I mean the farm land below would be damaged—that nearest to the canal. I think they keep a watchman on the canal now; they always did. There is no danger of breaks from the North Union Canal. There is about a mile and a half of the Provo Bench canal that runs along a hillside.

61 FRANK WENTZ, a witness called and sworn for the Defendants, testified as follows: I live in Provo and am a civil engineer. From the intake of the Provo Bench Canal to the South Fork of Provo River the surveyed distance is six and a quarter miles. I am the county surveyor of Utah county.

ROBERT THORN, a witness sworn for the Defendants, testified: I was a director in the Provo Bench Canal and Irrigation Company from 1883 until last year—twenty-four years. I assisted in making the canal.

I have heard the testimony of the witnesses as to the character of soil through which the canal is constructed, and I would testify the same as to that. I assisted in enlarging the canal in the years 1876 and 1878. We increased the fall by filling up the upper end four or five feet. We attempted to make the canal water-proof by puddling, mostly with clay, but partly clay, sand and gravel. That could be tightly packed so as to make the bottom water-tight. We tamped the clay in and worked it in the water. It took up twelve to fifteen years to do it. We lost considerable of our water while we were puddling the canal. They may have a better plan now. I think we lost a fourth, if not more, of our water.

Every spring we have a man go along our canal and examine it thoroughly for leaks. We clean it out every spring. We do not disturb the permanent bottom of it by cleaning it out. We are very careful about that.

I have a judgment as to the value of the canal for convey-
62 ing water from Provo River, where it receives the water, to the end of the canal, and my judgment is that it is worth Forty Thousand Dollars.

Cross-examination:

It is worth a good deal more than that.

Redirect examination:

In my judgment the advantage of location would add to the value of the canal.

Recross-examination:

The kind of monopoly we have there is our right-of-way over the land. We have not the only place where a canal could be taken out. I didn't know there was much thought they meant pretty much the same thing. I meant we had a monopoly on that site.

A. B. WALKER, a witness sworn for the Defendants, testified: I am president of Provo Bench Canal Company and have been an officer of the company since 1880, and was one of the original projectors. I am acquainted with the character of the soil through which it is built. The soil is of a loose gravelly nature. The top part of it, when the canal was built was a sort of cement, and after getting through there was a loose cobble-rock interlaid in
63 some places with quicksand. My recollection is that the canal was enlarged in 1870. We enlarged it by filling up the bottom and raising the banks. We made the bottom and sides impervious to water by puddling. In some places we tamped the soil in and in some places we worked it in with water. We had difficulty in getting it to hold water. We have kept a vigilant watch over it always. A break in the canal now would almost totally destroy the farms below.

Judging from my experience I should say it would be very unsafe for the people below to have that canal broken up to be enlarged.

N. J. KNIGHT, a witness sworn for Defendants, testified as follows: I am and have been a farmer on Provo Bench twenty-five or thirty years. I am a stockholder and officer in the Provo Bench Canal Company. I believe there is water enough to supply the needs of the stockholders in low water season. If the supply should be reduced we would suffer from it. I should say that taking water from the South Fork, where it has been used so that the seepage has come back into the river, and diverting it at the mouth of the canyon, would injure the companies below, because I believe that the same water they use in the South Fork is used again below. I would say the same is true of the water used on the Hoover farm.

ROBERT THORN, a witness for Defendants, being recalled, testified: I am acquainted with the supply of water that flows through the canals of the Defendant companies. During the low water season
64 theer is not sufficient water to mature the crops. The result is that we have to let some crops go and put the water on other crops. I consider that to change the place of use of water now used in the South Fork and on the Hoover farm, where it now runs back into the river, down to a place at the mouth of the canyon, would result in a loss to those below of the water now used above.

Cross-examination:

We claim we use the same water they use. I know this by observations I have testified to—that the water comes back by seepage.

MARK KARTCHNER, being sworn for the Defendants, testified as follows: I am secretary of the Provo Bench Canal Company. I have been through the books of the company to ascertain when the canal was completed and the stock fully paid up. In 1887 the stock was fully paid up at $25 a share—fifteen hundred and twenty (1520) shares—making $38,000. Since that time $6.349.50 has been expended in improvements and betterments of the canal, making the total cost of the canal $44,349.50.

In the late season there is not sufficient water to supply the stockholders with water needed for irrigation. I am a farmer and an irrigator. I have worked upon or farmed irrigated land all my life.

JAMES A. LOVELESS, recalled, testified: To diminish our supply of water in the low water season would hurt our crops to that
65 extent. We believe the maior part of the water used in South Fork runs back into the river and we use that same water again.

My judgment is that that canal is worth One Hundred Thousand Dollars.

Cross-examination:

I base my estimate upon the fact that the canal has cost us $49,000 to put it there, and it was put there in an early day and became the basis of our water rights.

I do not include the water right in fixing the value. Just the waterway. I do not pr-tend that it would take a hundred thousand dollars to build such a canal.

The canal was sixteen feet wide on the bottom at the narrowest place when it was completed. The headgate is in solid rock and the rest is through gravel-y bench. I am not acquainted with modern means of construction.

I knew the canal cost $38,000 up to 1879. I knew about the actual expenditures because I was on the ditch. I mean to say it actually and reasonably cost that.

In those days not much powder was used. The cement was very hard to get down a pick and hard to get out. That was before scrapers or teams were used in this country.

A. B. WALKER rec-lled, testified:

I am acquainted with the water supply furnished to the stockholders of the Defendant companies, and in the low water
66 season there is not sufficient water. Whatever decrease is made in our supply will mean that much loss to us in our crops.

In my judgment, if the water that is now taken out and used in the South Fork of Provo Canyon and that now used on the Hoover farm, where the seepage comes back into Provo River, should be taken out originally at the mouth of Provo Canyon, I take it we would lose whatever portion we are drawing from that. In my estimation that would certainly be a damage to us. I am acquainted with the North Union Canal, being an officer and superintendent. From my knowledge of the canal and the lay of the country, I think the effect upon the flow of water from lowering the bottom of Provo Bench Canal one foot would be very disastrous. We could not flow the water through the North Union unless we cut it down too.

We have scarcely any flow at the present time, and in low water season the water in Provo Bench Canal is not more than sixteen or eighteen inches deep.

Cross-examination:

To raise the water in Provo Bench Canal would give us more pressure in the North Union, and would be an advantage to us, but I think it would go above the danger line for the Provo Bench Canal. I think to raise the water up in the canal would increase the pressure on the sidehill and make it more liable to break, even though the added height be puddled and made impervious to water.

If the wall were strengthened with added material both in
67 the thickness and height that would more than counterbalance the added weight of water. I think it would not affect any one. I do not say that could not be done by competent construction.

It might be done by taking out the upper bank and putting the material on the lower bank, if the new work were made impervious to water, so that there would be no seepage. The upper bank of Provo Bench Canal, where the soil is gravelly, is sloped back so that it does not fall into the canal. Where the bank is perpendicular there is cement, almost as hard as clay or rock.

JOHN S. PARK, called and sworn on behalf of Defendants, testifies as follows:

I live on Provo bench and have been a farmer there 23 or 24 years. I get my water from Provo Bench Canal. I am a stockholder in the company. In the low water season we do not have sufficient water. It is hard to estimate the detrimental effect that a diminution of our supply of water would have upon our stockholders, now that a good deal of that country is in horticulture. To take water that is now used in the South Fork where the drainage comes back into the river and the water used on the Hoover farm, where the drainage comes back into the river down to us out at the mouth of the canyon, would diminish our supply.

Q. You are acquainted with how the water runs in this canal and also the North Union?

A. Yes, sir.

Q. What effect, in your judgment, would the lowering of the bottom of the Provo Bench Canal by one foot have upon the
68 flowing of the water into the North Union?

A. "It would be the damnedest fool thing that was ever undertook." What you need to do is to raise the upper end.

Cross-examination:

Raising it up a little would be an advantage.

JAMES GRAY, a witness sworn for the Defendant, testified as follows:

I am acquainted with the supply of water on and around Provo Bench, and in Provo; water that comes from Provo River.

The supply of water for irrigation is not sufficient in the low water season. Diminishing the supply would have a bad effect on the crops. If the water that is now used and has been used in the South Fork of Provo Canyon, and that which has been used on the Hoover farm, where the seepage and drainage come back into the river and come down, should instead of being taken out on that land and used there, be brought down and taken out in the Provo Bench Canal, the effect would be to decrease the water in this community.

Cross-examination:

There are times when they do not use all the water—in high water. I do not think there was ever a season when high
69 water did not run into the lake for a little while. At such times the people down here do not need the seepage from the Mecham and Hoover farms.

Defendants rest.

Plaintiff's Case on Rebuttal.

W. B. SEARLE, being recalled, testified:

I am acquainted with the general conditions surrounding the Provo Bench Canal. As to its points of division into what is known as the Provo Bench, the North Union, and Second North Union, I am not acquainted. The length is approximately 7,000 feet. I am familiar with the cost of construction of a canal of this kind. I have not computed the amount of material necessary to be removed by cross-sections of the canal, but I can give a very close estimate of the amount of material that would be required in the whole construction of that canal, side-hill and also level sections. I have estimated the cost of construction per lineal foot and find it to be $1.40 in the side-hill work and 70 cents in the level sections.

This map shows the length of the Provo Bench Canal to be 9,200 feet. Approximately 1,500 feet of that would come under the 70-cent classification, and six thousand feet at $1.40 a foot. I have figured that the cost of construction would be $10,500 for the excavation, not including the cost of refilling for the purpose of puddling the canal. That would cost approximately 40 cents a foot, possibly
50 cents, for such part of the canal as requires puddling. I
70 assume that five thousand feet would require puddling. I should approximate thirteen thousand dollars for the construction and puddling of that canal. The entire construction of the structure at the head of the canal must have cost in the neighborhood of $3,000.00. It may have cost considerably more than that. I do not think it can be replaced for that money. That would make the cost of the whole canal sixteen thousand dollars.

Cross-examination:

My estimate does not include the preliminary survey nor the right of way.

Redirect examination:

In some places the banks of the Provo Bench Canal are not in a condition of safety. The gravel and cement banks stand nearly, if not quite vertical, and these banks will cave in and slide off. On account of the expense of getting in there it would be impractical to take out another canal either above or below the Provo Bench Canal—the ground being occupied by the railroad and the works of the Telluride Power Company.

Recross-examination:

I have calculated the cost of a canal that would carry
71 twelve second feet of water and find it would be, if the same length as the Provo Bench Canal, $4,140.

The foregoing containing all evidence of every sort introduced at the trial of said cause, with all the objections of counsel thereto, with the rulings of the Court thereon, and the exceptions of the

parties, together with the correct recital of the dates of filing the Findings and Decree, the service of notice of filing of decree, Defendants' notice of intention to move for a new trial, the substance of the order of the Court overruling the same, with the date thereof, the date of Plaintiff's service of notice of the overruling of the motion for a new trial, and the various orders of the Court extending Defendants' time for serving and filing Bill of Exceptions herein, constitutes Defendants' proposed Bill of Exceptions herein.

Dated this 4th day of June, 1910.

J. W. N. WHITECOTTON,
S. R. THURMAN,
Attorneys for Defendants.

The foregoing, containing all the evidence of every sort introduced at the trial of said cause, with all the objections of counsel thereto, with the rulings of the Court thereon, and the exceptions of the parties, together with the correct recital of the dates of filing the Findings and Decree, the service of notice of filing of decree, Defendants' notice of intention to move for a new trial, the substance of the order of the Court overruling the same, with the date thereof, the date of Plaintiff's service of notice of the overruling of the motion for a new trial, and the various orders of the Court extending
72 Defendants' time for serving and filing Bill of Exceptions herein, constituting Defendants' proposed Bill of Exceptions herein; is correct and may be settled and allowed by the *Cause* as a true and correct Bill of Exceptions in said cause.

Dated this 6th day of June, 1910.

D. D. HOUTZ,
Attorney for Plaintiff.

The foregoing, containing all the evidence of every sort introduced at the trial of said cause, with all the objections of counsel thereto, with the rulings of the Court thereon, and the exceptions of the parties, together with the correct recital of the dates of filing the Findings and Decree, the service of notice of filing of decree, Defendants' notice of intention to move for a new trial, the substance of the order of the Court overruling the same, with the date thereof, the date of Plaintiff's service of motion of the overruling of the motion for a new trial, and the various orders of the Court extending Defendants' time for serving and filing Bill of Exceptions herein, is a correct statement of the proceedings in said cause, and is hereby settled and allowed as a true and correct Bill of Exceptions in said cause.

Dated this 7th day of June, 1910.

JOHN F. CHIDESTER,
Judge Presiding.

73 *Notice of Appeal.*

To the above-named Plaintiff and to D. D. Houtz, Esquire, Plaintiff's Attorney, and to the Clerk of said Court:

You and each of you will take notice herefrom that the Defendants named in the above-entitled cause hereby appeal to the Supreme Court of the State of Utah, from the judgment and decree of the District Court of the Fourth Judicial District of the State of Utah, in and for Utah County, made and entered by said Court in favor of the said Plaintiff and against the said Defendants on the 19th day of January, 1909, and made final by the overruling of Defendants' motion for a new trial by an order of said Court, made and entered on the 20th day of December, A. D. 1910, and from the whole of said judgment.

J. W. N. WHITECOTTON,
S. R. THURMAN,
Attorneys for Defendants.

Received a copy of the foregoing notice of appeal this 10th day of June, 1910.

D. D. HOUTZ,
Attorney for Plaintiff.

(Duly filed June 11, 1910.)

74 *Clerk's Certificate.*

I, M. E. Kartchner, Jr., County Clerk and Ex-Officio Clerk of the Fourth Judicial District Court in and for the County of Utah, State of Utah, do hereby certify that the foregoing is the original complaint, the original map, the original summons, the original demurrer, the original amended complaint, the original answer to amended complaint, the original findings of fact and decree, the original minute orders, the original notice of appeal, together with Defendants' Bill of Exceptions and that they constitute the Transcript on Appeal, and that they are transmitted to the Supreme Court of the State of Utah pursuant to such appeal. I further certify that there is a good and sufficient undertaking on appeal, approved by said Court on file in my office.

In witness whereof I have hereunto set my hand and affixed my official seal at Provo City, this 21st day of June, 1910.

[SEAL.] M. E. KARTCHNER, Jr., *Clerk.*

Transcript filed in Supreme Court July 11, 1910.

75 (Title of Court and Cause.)

Assignment of Errors.

Come now the Appellants named in the above entitled cause, and for grounds of reversal of the judgment in said cause, assign the following errors, to-wit:

I.

The Court erred in its second finding of fact, wherein it finds that the Plaintiff is the owner of certain water and water rights in and to the waters of Provo River, together with the right to divert the same from said river at a point where the canal of the Provo Bench Canal intersects said river: First, because the evidence is insufficient to justify such finding, and, second, because the finding is so indefinite and uncertain that it means nothing.

II.

The Court erred in its third finding, wherein it finds that the Plaintiff is entitled to a quantity of water in excess of two second feet, for the reason that said finding is not supported by the evidence, but on the contrary the evidence shows that the only water in Provo River owned by the Plaintiff is not to exceed two second feet of water to be used on the lands situated in the South Fork of Provo River, at a point eight or more miles above the place where Plaintiff now claims the right to divert said water, and that
76 where the said water is entitled to be used is on very sloping ground, where the said water nearly all runs off said land and back into said river and is then again taken out and used by other owners of the right to use the waters of said river, including these Defendants.

III.

The Court erred in that part of its 10th finding wherein it finds "And both of the said canals are such as to admit of enlargement and increased carrying capacity without detriment or injury thereto," for the reason that the evidence shows abundantly that the character of the soil through which the Provo Bench Canal is built is such that when the bottom or any portion of the surface is broken up, it requires many years to get it into condition to carry the water without loss, and that owing to the location of the said canal with reference to improved and inhabited farms below it, a break would prove very disastrous to property and to life.

IV.

The Court erred in paragraph four of its findings, wherein it found "the damage to said canals in the enlargement thereof by the Plaintiff, to the extent hereinafter found necessary, and hereinafter decreed, would be nominal, and is found by the Court in favor of each of the Defendants in the sum of $1.00." And especially is this so in connection with the seventh paragraph of the Court's decree, wherein it is "Ordered, adjudged and decreed that
77 the damages to the Defendants and each of them except such as may arise through defective or insufficient enlargement of the said canals, are nominal and are adjudged in favor of each of the Defendants in the sum of one dollar," for the reason that this is in effect taking the property of the Defendants and bestowing it

upon the Plaintiff without just compensation, in violation of Section Seven of Article One of the Constitution of the State of Utah, which provides "No person shall be deprived of life, liberty or property without due process of law," and is also in violation of Section One of Article XIV of the Amendments to the Constitution of the United States, which provides "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

V.

The Court erred in its first conclusion of law, wherein, it concluded that the Plaintiff is taking no portion of the Defendants' canals nor either of them to or for his use.

VI.

The Court erred in its second Conclusion of Law, wherein it finds that the Plaintiff is entitled to enlarge the said canals by adding ten cubic feet of water per second of time carrying capacity to each of the said canals, and after said enlargement, to flow through said canals a quantity of water not to exceed ten second feet.

VII.

The Court erred in its third conclusion of law, wherein
78–346 it concluded "That the damage to the Defendants by such enlargement is nominal, and found to be the sum of one dollar to each of the Defendants."

VIII.

The entire judgment of the Court is erroneous for the reason that it results in taking the property of the Defendants and bestowing it upon the Plaintiff without just or any compensation, and is, in effect, a confiscation of the Defendants' property.

IX.

The Court erred in overruling Defendants' motion for a new trial of said cause.

For all the foregoing reasons, the Appellants pray that the judgment of the trial Court be reversed, and the said complaint be ordered to be dismissed, and that the Appellants have such other and further relief as the Court may find them entitled to.

J. W. N. WHITECOTTON,
SAMUEL R. THURMAN,
Attorneys for Appellants.

Received a copy of the foregoing Assignment of Errors, this 30th day of July, A. D. 1910.

D. D. HOUTZ,
Attorney for Respondent.

347 In the Supreme Court of the State of Utah, Regular October Term, November 28, 1910.

CALEB TANNER, Respondent,

v.

PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Appellants.

Submission of Cause.

This cause coming on regularly for hearing was argued by Mr. J. W. N. Whitecotton and Mr. S. R. Thurman in behalf of appellants, by Mr. D. D. Houtz in reply, was submitted, and by the court taken under advisement.

348 In the Supreme Court of the State of Utah, Regular October Term, December 26, 1911.

CALEB TANNER, Respondent,

v.

PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Appellants.

Judgment.

This cause having been heretofore argued and submitted, and the court being sufficiently advised therein, it is now here considered, ordered and adjudged, that the judgment of the court below be, and the same is hereby affirmed, with costs.

349 In the Supreme Court of the State of Utah.

CALEB TANNER, Respondent,

v.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Appellants.

FRICK, *C. J.:*

The respondent instituted this proceeding to obtain permission to enlarge certain irrigating canals or ditches belonging to appellants. The proceeding is grounded on Comp. Laws 1907, Sec. 1288 x 22, which reads as follows:

"When any person, corporation, or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation,

or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; provided, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch."

The provisions contained in the foregoing section were first adopted in 1892 (Laws Utah 1892, p. 93) and have been in force in the Territory, and thereafter in the State of Utah ever since.

Respondent, in his complaint, among other things in substance, alleged that he had the right to the use of ten second feet of the waters of Provo River in Utah County; that appellants were the appropriators of, entitled to the use of, and did use a large
350 quantity of the water flowing in said river; that they were diverting said water from said river, and were conveying it through two certain canals or ditches of which appellants were the owners, and which canals constitute one continuous waterway or system several miles in length; "that there is about one thousand acres of arid land owned by divers persons near the north end of the said canal of the North Union Irrigation Company, as described, and it is so located with respect thereto that it is capable of being irrigated by waters drawn through the said canals; that said land is now barren and unproductive, and without artificial irrigation must remain so, and the only available source of water supply for the same is from Provo River, and the water now taken from the said river is insufficient to supply water for the said land, and in addition thereto there is a large area of land in the same location, for the irrigation of which the water supply is wholly insufficient and water, for irrigation in the said locality has a ready rental value for irrigation and other purposes, and by increasing the said water supply in the said locality much arid land will be redeemed, and the use of such water be made of great value to its owner for rental and other purposes; that it is the plaintiff's intention to, and he will, if he is permitted to enlarge the said canals as hereinafter prayed for, supply water for rental, to be used in the redemption of the said arid lands, and increase the supply for lands where the water right is at present insufficient, and divers persons are now ready upon assurance that such water can be supplied to enter into contract with the plaintiff for the use thereof;" that "there is no other available or feasible means of conveying said water to said lands than that of enlarging the said canals;" that appellants do not own any part of the lands traversed by said canals, but that they only own a right or easement in said lands for the purpose of maintaining said canals thereon to convey water through them; that prior
351 to the commencement of this proceeding respondent obtained the permission of the owners of the fee of the land traversed by said canals to enlarge the same, and that appellants refused to permit him to enlarge said canals, or to flow his water through them.

Respondent therefore prayed that he be permitted to enlarge said canals as one entire waterway to the extent of increasing their capacity ten second feet; that the damages to be sustained by reason of said enlargement be ascertained, and that it be decreed that upon payment of such damages to appellants respondent have a perpetual right to flow ten second feet of water through said canals for the purposes aforesaid.

It is not deemed necessary to set forth the averments of appellants' answer, except to state that appellants denied that the respondent was the owner of ten second feet of water, or any other quantity in excess of three second feet, and averred that the nature of the soil in which said canals are constructed is such as to cause great injury to said canals if respondent be permitted to reopen the bottom or sides thereof.

The case was tried to the court without a jury, and among other facts found by the court are the following: That respondent owns certain water rights in Provo river, the exact quantity of which isn't found except that it exceeds a flow of two second feet; "that at certain seasons of the year there is a large flow of water in said river in excess of the water appropriated by any person or persons whomsoever which is subject to an appropriation, and which plaintiff (Respondent) intends to appropriate and divert from the said river at the point aforesaid together with the water owned by him already." The point of diversion referred to is that at which appellants divert the water into their canal. The court also found that respondent can use the water he desires to convey through appellants' canals for the purposes alleged in his complaint,
352 which we have set forth, and that he "has no canal or waterway by means whereof he may convey his water to the said lands;" that the appellant, the Provo Bench Canal & Irrigation Company, has acquired a right of way or easement to construct, and has constructed a canal 16 feet wide and about 2½ feet deep, and 9,200 feet in length, and that the other appellant has acquired a similar right and easement to construct, and has constructed, a canal which is practically a continuation of the Provo Bench Canal aforesaid; that the latter canal is ten feet wide and about two feet deep, the length of which is not given, but the point at which respondent desires to take his ten second feet of water from said canals, and the distance that he desires to enlarge them, are specifically set forth. The court also found that the canals, as now constructed, are irregular in size and that their maximum capacity at their smallest point is 125 second feet and that appellants require the full capacity of said canals to carry the water used by them. It is further found that it is feasible to enlarge said canals, and that the same "in their entire course are excavations and cuts and fills of earth and are such as admit of enlargement and increased conveying capacity without detriment or injury thereto." The court found that the damages sustained by each appellant to be the sum of one dollar.

The court, in the decree based upon its findings, among other things, required that the canals be enlarged under the supervision of a competent civil engineer who may be selected by appellants and

whose services shall be paid for by respondent; that wherever the "water surface" of said canals is broken and the character of the soil is such as may cause loss of water by seepage or percolation, such places, if any, must be sealed by puddling or other means so as to avoid loss as aforesaid; that respondent must bear the loss of water while in transit through said canals. It is also provided that the water which is turned into said canals by respondent shall be
353 controlled by appellants at the expense of respondent who "shall pay all costs of all devices and means made necessary for diverting said added amount of water into said canals and all devices, gates, and means of dividing said water and measuring the same out of the said canals, and shall pay pro rata the costs and expenses of maintaining said canals in the proportion that ten second feet of water bears to the carrying capacity of said several canals." The decree also provides as follows:

"It is further ordered, adjudged and decreed that the plaintiff, before entering upon work of enlargement, execute and file in this cause in the above named court, a good and sufficient bond in the penal sum of fifteen thousand dollars, to be approved by the clerk of said court, in favor of the defendants jointly and severally, conditioned for the execution of said work of enlargement in such manner as to add ten second feet carrying capacity to each of the said canals without injury to the said canals and to maintain the same with their present margin of safety and in as an impervious state to water as they are at the present time, and conditioned for the payment of all damages that may arise to the defendants or either of them through failure to execute said enlargement in manner aforesaid, and conditioned for the payment to the defendants and each of them, of all damages which may be done to them or any person for which they may be responsible, arising out of the enlargement of said canal by plaintiff, and further conditioned that the plaintiff will pay all costs and expenses of controlling, regulating and dividing his water as aforesaid by the defendants and his pro rata costs and expenses of maintaining the said canals as hereinbefore decreed and determined. The said bond shall be perpetual and a condition precedent to the right of the plaintiff to enlarge asid canals, and precedent to the right of the plaintiff and his successors in title to flow water therein.

It is further ordered adiudged and decreed that the damages to the defendants, and each of them, except such as may arise through defective or insufficient enlargement of the said canals, are nominal, and are adjudged in favor of each of the defendants in the sum of one dollar, and further damages are provided for with the bond defendants, and each of them, except such as may arise through decree, may be changed in the amount thereof upon motion with notice to the adverse party, upon sufficient showing of necessity for such change, and the court retains jurisdiction to make further order respecting said bond."

While counsel for appellants have assigned quite a number of errors by which they assail the findings of fact and some of the conclusions of law, yet, in their brief, they have practically confined

their arguments to three only of the assignments. The first
354 assignment relates to the findings, and it is contended that the court erred in finding that the respondent "is the owner of certain water and water rights in and to the waters of Provo river together with the right to divert the same from said river at the point where the canal of the Provo Bench Canal Company intersects said river" because there is no evidence to sustain such finding. The argument of counsel in this respect is, that the water right owned by respondent is a right to use water which is diverted at a point farther up the stream than the point of diversion of appellants' canals, and hence it is claimed that respondent owns no water right at the point of diversion of said canal. From the evidence it appears, however, that respondent can divert his water at the point where appellants' canals divert the waters from Provo river, and hence the findings is supported by the evidence. But it is contended that the respondent has not shown that he has an actual and subsisting right to the use of ten second feet of water and hence the court erred in giving the respondent the right to enlarge appellants' canals for the purpose of conveying water through them which he does not own. As already pointed out, respondent has some water which he can divert into appellants' canals, and it is undisputed that in certain seasons of each year there flows a large quantity of unappropriated water in Provo river a portion of which respondent intends to, and has, made application to appropriate and if permitted will divert it through appellants' canals. From the evidence and findings it is clear that respondent can neither divert nor devote to a beneficial use any part of the water owned by him nor any of the unappropriated waters aforesaid, unless he can divert said water into and convey the same through appellants' canals to the lands which he seeks to irrigate and reclaim with the water aforesaid. Under such circumstances it is apparent that if the courts are powerless
to authorize an enlargement of a ditch or canal pursuant to
355 the provisions of Sec. 1288 x 22, supra, until an actual appropriation of water is made and completed, then surplus water flowing in a stream may be prevented from being made available at all because it cannot be applied to a beneficial use unless it can be diverted into and conveyed through some particular ditch or canal owned by some person other than the appropriator of the water to the place where it is intended to be applied to a beneficial use in case the owner of the canal objects. In this case there is evidence, however, that an application to appropriate a portion of the surplus water of Provo River has actually been made with a view of diverting the same in to the canals of appellants for use upon the lands mentioned in respondent's complaint and in the findings, and that the application has been allowed. Appellants, however, contend that said application should be ignored by us because it was made for the benefit of, and allowed by, respondent, who, in his official capacity as State engineer, is alone authorized to pass upon and allow such applications. The statute of this state, so far as we are aware, does not exclude any person from making an application for any of the unappropriated waters of this state. Moreover, the statute gives the

right to any person interested to protest any application for water, and, if his protest be disallowed he may have the right to appropriate the water applied for determined by the courts. The statute, therefore, provides a direct method by which the application to appropriate water may be tested and the rights of the applicant, as well as the alleged rights of all interested persons, may be heard and determined. We are also of the opinion that in adopting the statute aforesaid it was not intended that courts should have, or exercise, the power to pass upon and determine the water rights of a person who seeks to avail himself of the provisions of Sec. 1288 x 22, supra, in a proceeding based upon that section. We think all that
356 the applicant is required to show in a proceeding instituted pursuant to said section is, that he has water, or has applied for water, and that his application is made in good faith, and that he desires to avail himself of the provisions of said section. To such effect are all the authorities that we have been able to find. In Schnider v. Schnider (Colo.) 86 Pac. 347, it was contended that "no easement can be acquired for a ditch" by condemnation proceedings until the right to the use of the water to be conveyed by the proposed ditch shall have become vested. The Supreme Court of Colorado, however, held that such is not the law, and further held that the question of water rights cannot be considered in such a proceeding. It was there also held that it is not essential to the exercise of the right contemplated by Sec. 1288 x 22 that the applicant shall have a vested right to the use of the water which he seeks to convey through the proposed ditch. To the same effect are the following cases: Gibson v. Cann (Colo.) 66 Pac. 879; Prescott v. Flathers (Wash.) 55 Pac. 635; State v. Centralia etc. Co. (Wash.) 85 Pac. 344. See also Trippe v. Overbecker (Colo.) 1 Pac. 695, where the Supreme Court of Colorado held that a statute similar to Sec. 1288 x 22 wherein the question of damages is left to the determination of a court or jury is valid.

Upon principle, the conclusions reached in the foregoing cases seems to us to be clearly sound. The applicant who seeks to enlarge a ditch, before he may proceed to do so, must pay the owner thereof all the damages he may sustain by reason of the enlargement. In the case at bar, respondent must not only do this, but, in addition, he is required to give an indemnity bond which, according to the evidence, is almost equal in amount to what the present cost of constructing appellants' canals would be, although the original cost, including maintenance, was much more. If respondent,
357 therefore must, in advance, pay all the damages that appellants may suffer and in addition must provide an indemnifying bond securing them against every possible future injury or damage, they certainly have no interest in whether he has completed his application to appropriate water or not. Moreover, it is not reasonable to assume that respondent will incur all of the foregoing costs and expenses in enlarging the canals before he has water to flow through them.

Appellants also insist that the court erred in finding that "both of the said canals are such as to admit of enlargement and increased

carrying capacity without detriment or injury thereto." Although this finding is vigorously assailed, yet we think it is sustained by the clear, if not the overwhelming weight of the evidence. It is beyond dispute that appellants have constructed, and for many years have successfully maintained, the canals sought to be enlarged, and that they have been able to make them impervious. The court, in the decree, in order to keep them so, requires respondent to follow the methods which, by years of actual experience, have been found practical and sufficient to maintain the canals in that condition. The matter is therefore not left to speculation or conjecture, but the decree is based upon actual experience. It is reasonably safe to infer therefor- that what has proved sufficient to maintain the canals in proper condition in the past will likewise keep them so in the future, and in accomplishing this, respondent is compelled to assume all the risks.

Counsel for appellants most vigorously insist that the court committed flagrant error in fixing the amount of damages, and they, in the strongest possible terms, claim that sacred rights of their clients have been disregarded, and that their property has been taken
358 without just or any compensation. This presents the principal question in the case, and, at first blush, there seems to be much merit in counsel's contention. Upon a closer, and a more comprehensive, view of all the facts and circumstances, however, the first impression soon yields to the actual conditions as they are presented by the record. It is not questioned, nor could it well be under the ruling of this court made in Nash v. Clark, 27 Utah, 158, that the use sought by the respondent is a public use, and hence he may acquire the right to the use of appellants' canals through the exercise of the power of eminent domain. In doing so, however, the appellants must be fully compensated for all of their property that is taken or damaged. If this be done, however, they cannot legally complain. We remark that neither in the complaint nor in the answer is anything said respecting the value of the property affected, nor of the amount of damages that the appellants, or either of them, will or may sustain if respondent is permitted to enlarge their canals. We do not make the foregoing statement because we think that allegations or averments of value, in a proceeding like this, were necessary in any of the pleadings, but we allude to it merely because it is a fact. At the trial there was no direct evidence with respect to the amount that either of the appellants would be damaged by the proposed enlargement of the canals. There was evidence, however, of the cost of construction and maintenance of the canals, the character of the soil through which they are constructed, the possibility of loss of water by seepage or percolation through the sides and bottom of the canals in case either is broken, and other elements that are referred to in the findings and bond to which we have referred. In this connection it is urged by appellants that, at all events, it is clear from the evidence that the amount of damages was far in
359 excess of that allowed by the court, although no direct evidence of damage was offered. It is also contended that the

burden of establishing the amount of damages was upon respondent, and that in any event the court erred in permitting him to enter upon appellants' property before he had established what was just compensation for appellants' property taken or affected by his proposed improvement. We think, however, that, under the practice in force in this jurisdiction, the burden of establishing the quantum of damages was upon the appellants. Such has always been, and continues to be, the practice in *this* district courts of this state. Moreover, such is the great weight of authority under statutes similar to ours. In 15 Cyc. 898, the prevailing rule upon this question is stated as follows: "The burden of showing necessity and public use is upon petitioner. The burden of showing the damages which the owner will suffer rests on him." In 2 Lewis, Eminent Domain, 3rd ed. Sec. 645, the rule is stated to be in accordance with the text quoted from Cyc., and the author of Lewis, Eminent Domain, in part at least, collates the cases both for and against the rule as there stated. In addition to the numerous cases cited by Mr. Lewis, see also Monterey County v. Cushing (Cal.) 23 Pac. 700; Los Angeles County v. Reyes (Cal.) 32 Pac. 233, and cases there cited.

The question, therefore, is, did the court err in fixing the amount of damages? It must be remembered that it is conceded that the appellants did not own the fee of the lands traversed by the canals in question, but all they owned was an easement or right of way and right to maintain the canals upon the lands in question. All that respondent sought to, and all that he could condemn, as against appellants, was a similar right or easement. Respondent's easement was, however, to be imposed upon, or added to appellants' existing easement. No doubt appellants' easement, in legal contem-
360 plation, constituted property, and an interference with, or an impairment of it, was in legal effect, an interference with property or with a property right belonging to them, and for such interference or impairment they are entitled to what our constitution terms "just compensation." If appellants' easement, therefore, is regarded as property, it, nevertheless, is property which was and could be used only for a particular purpose, namely, for the purpose of conveying water for certain purposes from one point to another in Utah county. Under such circumstances the measure of damages was the "extent to which it (the easement) was rendered less valuable for the uses to which it was devoted." 2 Lewis, Eminent Domain, 3rd ed. Sec. 723, and cases there cited. The question, therefore, is, to what extent is the value, or the value of the use, of appellants' canals reduced by enlarging them to the extent and for the purpose permitted by the trial court. We have already pointed out that there is no direct evidence upon this point whatever. Counsel, however, urge, that to permit respondent to use their canals as contemplated will be of great advantage and may result in considerable profit to him. This may be so, and yet the question remains, in what way does what he is permitted to do damage appellants? They are limited in their recovery by the amount of damages suffered by them. They cannot recover for any benefit respondent may

receive. If the benefits and advantages that may be obtained through the exercise of the right given by Sec. 1288 x 22, supra, must be paid to the owner of the canals before the right can be exercised, then the purposes sought to be attained by said section are thwarted and the supposed advantages or benefits to be derived therefrom are neutralized and the statute may as well be repealed. While counsel, apparently have been unable to find,—nor have we
361 found,—any cases precisely in point, yet analogous cases in which the principle respecting the measure of damages applicable to the case at bar is illustrated and applied are not rare. In the case of Chicago, B. & Q. Rd. Co. v. Chicago, 166 U. S. 226, counsel for the railroad company advanced precisely the same arguments that are presented by counsel for appellants in this case. In that case a public easement was imposed upon or added to a private easement, just as in the case at bar. A public street crossing was laid over the company's right of way, and in doing so it was required to open up a crossing and maintain it and to assume the risks incident to a public railroad crossing in a city. The amount of damages allowed in that case was one dollar as in this case, and the company contended that its property was being taken without just or any compensation, and was taken without due process of law. Mr. Justice Harlan, in an exhaustive opinion, considered the company's contentions from almost every point of view, and the court arrived at the conclusion that the damages of one dollar awarded the company, in view of all the circumstances, constituted just compensation. In the course of the opinion (pp. 241-242) it is said: "The contention of the railroad company is that the verdict and judgment for one dollar as the amount to be paid to it was, in effect, an appropriation of its property rights without any compensation whatever; that the judgment should be read as if in form as well as in fact it made no provision whatever for compensation for the property so appropriated. * * * The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, under all the circumstances, is a fair and full equivalent for the thing taken from him by the public. If the opening of the street across the railroad tracks did not duly interfere with the company's use of the right of way for legitimate railroad purposes,
362 then its compensation would be nominal." So here, if appellants' use of their canals is "not unduly interfered with" by the enlargement and use that respondent is permitted to make of them under the conditions that are imposed upon him, then in view that he neither takes any property nor interferes with any substantial property rights of appellants, their damages must be merely nominal. In what way does respondent interfere with appellants' use of the canals? Is it reasonable to assume that ten second feet of water added to a flow of 125 second feet, or an increase of about 8 per cent, will "unduly interfere" with appellants' use of the canals? While it is true that the quantity of water which respondent is permitted to add to the present flow in the canals might, under certain circumstances, cause injury, yet in this case the evidence clearly shows that

such a result is not at all likely or probable. Moreover, the decree guards and protects appellants against any future damage or liability that may be occasioned by the enlargement of the canals and the additional flow of water therein. No one can seriously contend that, in view of the evidence in this case, it is possible at this time to say that any material damages will be suffered by appellants in case of the enlargement of the canals. If this be true, then it must follow that the future damages, if any, that appellants may suffer are such as are denominated "remote, imaginary, uncertain and speculative." Such damages, it has been frequently held, should be disregarded. 2 Lewis, Eminent Domain, 3d ed. sec. 739, and cases cited. The trial court, however, in permitting respondent to enlarge the canals and to convey his water through them, has required him to protect appellants against any contingencies or risks and has required him to give and keep in force perpetually a bond to which appellants may constantly have recourse for indemnity in case any injury or
363 damage shall result from the enlargement and use of the canals by respondent. From what appears in the case passed on by the Supreme Court of the United States to which we have referred, it is reasonable to assume that the railroad company would have been well satisfied if the court had protected it as appellants are protected. See also Chicago B. & Q. Rd. Co. v. Chicago, 149 Ill. 149. In those two cases about all of the contentions made by counsel for appellants are disposed of adversely to them. The same principle is discussed and in effect applied by this court in Postal Tel. etc. Co. v. O. S. L. R., 23 Utah 474.

In 4 Suth. Dam. 3rd ed. Sec. 1063, at page 3104, the author, in discussing what constitutes just compensation for taking property under the right of eminent domain, says:

"According to the best authorities, however, it is believed to be remuneration for the *net injury which is suffered from the exercise of this sovereign right.* The word 'compensation' imports that a wrong or injury has been inflicted and must be redressed in money. Money must be paid to the extent of the injury. This may be less or more than the value of the property taken; but when compensation has been made *to the extent of the injury* the language and just purpose of the constitution are satisfied." (Italics ours.)

Where, as in this case, no property is actually taken and all that is sought is merely to impose an easement or additional servitude upon an existing one, and the owner of the prior easement is not deprived of its use, or is not unduly interfered with, it is easy to perceive how the damages suffered by the owner may be merely nominal. This principle is well illustrated in the cases of In re Village of Olean v. Steyner, 135 N. Y. 341; Matter of Adams, 141 N. Y. 297, and Arnold v. Hudson R. Ry. Co., 55 N. Y. 661. In the first case last above referred to Mr. Justice Finch, in speaking for the New York Court of Appeals, says:

"The commissioners, therefore, could only award to the owners (of the prior easement) the value of the public easement taken, deducting therefrom the value of the private easement, which already encumbered the property. (Matter of City of Brooklyn, 73 N. Y.

184.) It is quite evident that the public right taken, deducting therefrom the value of the private easement leaves only a
364 nominal injury because the added burden is itself but technical and nominal. The real burden is in no manner increased by absorbing the private in the public right, or substituting the latter in the room and stead of the former, since as burdens on the land they are substantially identical."

See also Joyce on Damages, sec. 76.

If, therefore, we attempt to express appellants' damages in the terms employed by the New York Court of Appeals it is still apparent that the value of their easement, that is, the value of the canals and the right to maintain and devote them to the purposes for which they are intended, is just as great after the enlargement as it was before. Nor is — apparent, nor probable, that the convenient use of the canals will be impaired to any appreciable extent.

But it is contended that appellants are affected in the control of the canals and in making repairs if any are necessary. Such a claim is always possible when one easement is added to another and where a use becomes a double instead of a single one. This, however, is not a matter for which substantial damages can be allowed unless the acts of interference unduly interfere with a present use or invades a substantial right which is recognized as possessing substantial value. In this case all that respondent is permitted to do is to conduct his water into the canals, and after it flows into them it is placed under the exclusive control of appellants, and all they do is to turn it back to respondent at the point he desires the water for use. For any services of appellants in so conducting his water respondent must pay them the reasonable value. In making repairs respondent is given no special right to enter the canals but is compelled to pay his proportion of the cost of making repairs. Appellants, therefore, are neither unduly interfered with nor hampered in their control of the canals, and hence cannot be injured or damaged in that regard.

365 It is further contended by appellants' counsel in their brief that by the decree appellants "are to be deprived of their right to enlarge (the canals), their right to appropriate additional water, their right to supply others for a profit to the extent at least that plaintiff occupies their canals, thus transferring these identical rights which the plaintiff says will be valuable to him from the defendants who have them to the plaintiff who has them not." By what is said counsel assume that appellants had an exclusive vested right to appropriate the water which respondent claims and which he intends to convey through the canals. In our judgment this assumption is not tenable. While appellants no doubt had the right to make application to appropriate additional unappropriated waters flowing in Provo River if they so desired, yet they had no better right to do so than anyone else had, including respondent. Such a right was one they enjoyed in common with all persons, and the first applicant who has complied with the law relating to making application for the appropriation of unappropriated water obtains a prior right to appropriate the

same. Appellants had made no application and hence had no rights of which respondent could have deprived them. The right to make an application to appropriate water is neither a transferrable right nor subject of sale, and hence one citizen cannot legally complain because another has made a prior application and has in that way initiated a prior right as against all other citizens. If respondent had no prior right to appropriate the surplus waters of Provo River, then appellants may make application therefor and establish a right thereto in themselves. If they can establish such a right there is nothing in the decree which prevents them from enlarging their canals at any time. Moveover, the decree specially provides that in enlarging the canals the irrrgularity of their banks must be maintained. This condition was imposed upon
366 respondent so that appellants, and not he, should enjoy the benefits of the wider portions of the canals in case they desired to increase the capacity of their canals. Here again, appellants are fully protected. In either view, therefore, no legal right of appellants in or to any water, or to the use thereof, or to make application therefor, or to the enjoyment of any advantage they may have, has been invaded, taken or impaired by respondent, and for these reasons appellants' contentions are not tenable.

The contention that some of the conclusions of law are erroneous, even if conceded to be true, is not of controlling importance in view of the findings. In our opinion the findings are supported by the evidence and the judgment is in accordance with the material findings of fact. In view of this the mere fact that some of the conclusions of law may not be logically correct cannot affect the judgment. In Davis v. Baugh, 59 Cal. 576, the Supreme Court of California, in referring to this subject, says: "Where some of the 'conclusions of law' in a decision are not properly drawn from the facts found this is no ground for reversing the judgment if the ultimate conclusion upon which the judgment rests is not erroneous in view of the facts found. In such a case the minor conclusions are at most but errors,—erroneous deductions which do not injure the party complaining of them." See also Miller v. Hicken, 92 Cal. 229; Spencer v. Duncan, 40 Pac. 549.

In concluding this opinion we desire to make it clear that by what we have said we do not mean that in making applications for the enlargement of ditches or canals pursuant to section 1288 x 22 substantial damages may not be recovered although the owner of the canal or ditch is not deprived of the use thereof. What we mean is, that in this case nothing is made to appear upon which a finding or judgment for substantial damages can rest.
367 Each case, under said section, must be determined in accordance with its own facts and circumstances. No hard and fast rule can be laid down relative to the question of damages that should be allowed in all cases. It can be said, however, that where the case falls clearly within the principles laid down by the Supreme Court of the United States and the state courts to which we have referred, then only nominal damages are recoverable because the injury is merely such. Nor do we wish to be understood

as holding that an applicant under section 1288 x 22, may, by giving a bond, postpone the payment of any damage which is a proper element to be considered in fixing damages. Such has not been done in this case. What we mean to say with regard to the bond is, that the court has protected appellants against all future contingencies which might result in damages. Whether the court had the power to do this without the consent of the applicant we do not consider in view that he is satisfied.

We are clearly of the opinion that appellants' use of their canals will be the same after the enlargement thereof as before, and that they have not shown wherein they will suffer inconvenience, injury or damage to any extent, and hence the judgment ought to be, and it accordingly is, affirmed, with costs to respondent.

I concur:

W. M. McCARTY, *J.*

STRAUP, *J.:*

I dissent. My principal reasons therefor are stated in my dissenting opinion in the case of Salt Lake City v. East Jordan Irrigation Company also just decided.

368 In the Supreme Court of the United States.

2164.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Plaintiffs in Error,

vs.

CALEB TANNER, Defendant in Error.

Petition for Writ of Error.

And now come The Provo Bench Canal and Irrigation Company, a corporation, and The North Union Irrigation Company, a Corporation, the plaintiffs in error herein, and respectfully show to this honorable court;

1. That on the 16th day of July, 1908, Caleb Tanner, the defendant in error herein, filed in the district court of the Fourth Judicial District of the State of Utah, in and for Utah County, his amended complaint, in which he alleged in substance the several corporate existence of the defendants therein.

That he is the owner of the right to use ten cubic feet per second of time of the waters of Provo River.

That he has the right to divert said water from said river at the head of the canal of the defendant, Provo Bench Canal and Irrigation Company, and that he has no canal or water way by means of which he may convey his said water to the place where he has use for it. That the defendant, Provo Bench Canal and Irri-

gation Company, acquired an easement and right of way and constructed a canal, about sixteen feet wide and two and one-half or three feet carrying capacity in depth, over a course described in said amended complaint, as beginning at a point on the bank of Provo River, near the mouth of Provo Canyon, and extending thence a distance of 9,200 feet. That at the lower end of the above-described canal, is the beginning of the canal of the other defendant, which is a continuation of the first canal, and that at a point 5,395.2 feet down the latter canal is where the plaintiff desires to take his water from the canal of the North Union Irrigation Company, making a total length of canal of 14,595.2 feet sought to be taken by the plaintiff from the defendants, that is to be made a common water way for him with them. That there are about one thousand acres of arid land owned by divers persons near the north end of said canal of the north Union Irrigation Company,
369 that could be irrigated by water drawn through said canals; that said land is now barren and unproductive, and, without artificial irrigation will remain so; that there are other lands in the same locality that are insufficiently irrigated, for lack of water. That plaintiff's water would be very valuable for rental and other purposes. That if he is permitted to enlarge said canals, it is plaintiff's intention to supply water for rental purposes, and he has divers prospective customers therefor.

That the country over which plaintiff would be compelled to construct an independent and new canal, in order to get his said water to the said lands, is such that the costs thereof would exceed the value of the water right, and there is no other or feasible means of conveying said water to said lands than that of enlarging the said canals of the defendants, and said enlargement can be made without damage to the defendants or either of them.

That the defendants do not own the fee in the lands traversed by the said canals, but they have only an easement over the lands for canal purposes, and that prior to the commencement of this action, plaintiff acquired the consent and permission of the several owners of the fee in the lands traversed by the said canals to enlarge the same, but the defendants and each of them refuse to permit the plaintiff to enlarge the said canals and refuse to permit him to run his said water through them.

Plaintiff therefore prays judgment that he be permitted to increase the carrying capacity of each of the said canals to the extent of ten cubic feet of water per second of time, by enlarging the same and that the character of such enlargement be determined.

That the damage to each of the defendants by such enlargement of said canals be determined, and that upon payment of such damage, and the enlargement of said canals, the plaintiff be decreed the privilege and perpetual right to flow water through said canals to the extent of such enlargement.

2. To this amended complaint the defendants answered and denied that plaintiff owned more than three second feet of water. They deny the feasibility of enlarging the carrying capacity of said canals as alleged with this qualification, viz: While it is possible

to enlarge the said canals the soil through which they are made is of a very porous nature, underlaid by a bed of gravel, which renders it extremely difficult to make a canal that will not leak, and the beds of said canals have been for many years settled,
370 and are now in a condition that enables them to hold the water flowing therein without excessive waste through leakage; but defendants allege that by breaking the bottom and banks thereof, it would be very difficult again to make said bottoms and banks impervious to water, and the same would necessarily result in great loss of water to the shareholders in the defendant companies by leakage and waste of water.

They deny that the country over which plaintiff would be compelled to construct an independent and new canal, in order to get his water to the place desired, is such that the costs thereof would exceed the value of his water right, and deny that there is no other or available or feasible means of conveying said water to said land than that of enlarging said canals of the defendants.

Further answering plaintiff's complaint, defendants allege that the canals of defendants were constructed at an actual cost of fifty thousand dollars ($50,000.00), and that the soil through which they are constructed is of a porous nature, containing much sand and gravel, and that under the soil is a bed of gravel, which is very porous and difficult to so treat as to prevent the water from percolating through it. That in the year 1878, it became and was necessary for the defendants to enlarge their said canals, and it was necessary to break up the surface *of* thereof, and it required eighteen years' time for defendants to repuddle the said canals so that they would carry the water safely and without great waste, and during said time great quantities of water went to waste owing to the inability of defendants to prevent the same.

That large quantities of water are carried in said canals, and owing to the character of the soil through which they run, the defendants are always under great responsibility and liability for damages for injuries that may occur to the farms below said canals, in case of a break therein, and that by running more water in said canals their liability would be greatly increased. That to permit the plaintiff to invade and interfere with the canals of the defendants as in his complaint prayed for, would result in great and irreparable injury to the defendants and to each of them, and ought not to be permitted.

3. Upon these pleadings the cause was tried and the trial resulted in the plaintiff being awarded by the district court all he asked for upon his paying one dollar to each of the defendants as dam-
371 ages for taking and using the said canals in the manner prayed for, and giving an indemnifying bond to protect the defendants against future damages that may accrue from an improper or defective enlargement of said canals.

4. From this judgment of the district court, the defendants appealed to the supreme court of the State of Utah, which on the 26th day of December, 1911, rendered its judgment affirming the judgment of the trial court.

In the supreme court of the State of Utah, the defendants contended: "That the trial court, in awarding to the plaintiff the right to enter upon and use the property of the defendants for a compensation of one dollar, was, in effect, taking the defendants' property and bestowing it upon the plaintiff without just compensation, in violation of Section One of Article XIV of the Amendments to the Constitution of the United States which provides: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law' ", and the decision of said supreme court was and is against such contention of the defendants.

Wherefore, these plaintiffs in error pray That a writ of error may issue in this behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to this the supreme court of the United States.

Dated December 3rd, 1913.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY AND THE NORTH UNION IRRIGATION COMPANY,
Plaintiffs in Error and Petitioners,
By J. W. N. WHITECOTTON,
Their Attorney.

Attorney's address, Provo City, Utah.

Filed Dec. 4, 1913. H. W. Griffith, Clerk Supreme Court, Utah.

372 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the supreme court of the State of Utah, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Caleb Tanner, and The Provo Bench Canal and Irrigation Company, a corporation, and The North Union Irrigation Company, a corporation, wherein was drawn in question an authority exercised under said State of Utah on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error hath happened to the great damage of the said The Provo Bench Canal and Irrigation Company and the said The North Union Irrigation Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington on the 3rd

day of Feb'y A. D. 1914, in the said supreme court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said supreme court, the 3 day of December, in the year of our Lord, A. D. 1913.

[Seal United States District Court, District of Utah.]

JERROLD R. LETCHER,
Clerk United States District Court,
District of Utah.

Allowed by
W. M. McCARTY,
Chief Justice of the Supreme
Court of the State of Utah.

Filed Dec. 4, 1913. H. W. Griffith, Clerk Supreme Court, Utah.

373 UNITED STATES OF AMERICA, *ss:*

To Caleb Tanner and to D. D. Houtz, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Utah, wherein The Provo Bench Canal and Irrigation Company and The North Union Irrigation Company, each a corporation, are plaintiffs in error, and said Caleb Tanner is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable William M. McCarty, Chief Justice of the Supreme Court of the State of Utah, this 3rd day of December, A. D. 1913.

W. M. McCARTY,
Chief Justice of the Supreme Court
of the State of Utah.

Attest:
H. W. GRIFFITH,
Clerk Supreme Court of Utah.

The foregoing citation was served upon me by the delivery to me of a copy thereof, at Salt Lake City, Utah, this 3 day of December, A. D. 1913.

D. D. HOUTZ,
Attorney for Caleb Tanner,
Defendant in Error.

Filed Dec. 4, 1913. H. W. Griffith, Clerk Supreme Court, Utah.

374 In the Supreme Court of the United States.

In the Matter of the Petition of THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, for a Writ of Error to the Supreme Court of the State of Utah.

Assignment of Error.

Come now The Provo Bench Canal and Irrigation Company, a corporation, and The North Union Irrigation Company, a Corporation, petitioners for a Writ of Error to the Supreme Court of the State of Utah, by J. W. N. Whitecotton, their attorney, and say:

That the Supreme Court of the State of Utah, in rendering its decision and judgment in this cause, erred in the following respects, to-wit: The said court erred in affirming the judgment of the trial court and awarding to the plaintiff in the lower court the privilege of entering upon and enlarging the canals of the defendants there, plaintiffs in error here, and making use of said canals, upon payment of the mere nominal consideration of one dollar to each of these plaintiffs in error, for the reason that such award and judgment is in effect taking the property of the plaintiffs in error and giving it to the defendant in error for no consideration, and is therefore, taking said property without due process of law in violation of Section One of Article XIV of the Amendments to the Constitution of the United States, which provides; "Nor shall any State deprive any person of life, liberty, or property without due process of law." Which said provision of the Constitution of the United States was expressly cited, urged, and relied upon by the defendants in said Supreme Court of the State of Utah, as a ground of reversal of the judgment of the trial court.

J. W. N. WHITECOTTON,
Attorney for Plaintiffs in Error.

Address: Provo, Utah.

Filed Dec. 4, 1913. H. W. Griffith, Clerk Supreme Court, Utah.

375 In the Supreme Court of the State of Utah.

THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Defendants and Plaintiffs in Error,

vs.

CALEB TANNER, Plaintiff and Defendant in Error.

Waiver of Undertaking.

Whereas the above-named plaintiffs in error are desirous of suing out a writ of error in this cause from the supreme court of the United States to the supreme court of the State of Utah, and

Whereas the defendant in error is confident that the said plaintiffs in error will prosecute said cause to a final determination, and will pay all costs and damages if they fail to make said writ of error good,

Now, therefore, in consideration of the premises, the defendant in error hereby waives the giving of any bond or undertaking by said plaintiffs in error, and this stipulation and waiver shall operate as a supersedeas pending the determination of this cause in the supreme court of the United States.

Dated this 3rd day of December, 1913.

CALEB TANNER,
Defendant in Error,
By D. D. HOUTZ,
His Attorney.

Filed Dec. 4, 1913. H. W. Griffith, Clerk Supreme Court, Utah.

376 UNITED STATES OF AMERICA,
State of Utah, County of Salt Lake, ss:

I, H. W. Griffith, Clerk of the Supreme Court of the State of Utah, do hereby certify that pursuant to a Writ of Error directed to said Supreme Court of Utah, wherein the Provo Bench Canal and Irrigation Company, a corporation, and The North Union Irrigation Company, a corporation, were plaintiffs in error, and Caleb Tanner, is defendant in error, I herewith return attached hereto a transcript of the record and proceedings on appeal to said Supreme Court, together with a copy of the order of submission of said cause, judgment rendered therein, and the opinion filed December 26, 1911;

Also the original Petition for a Writ of Error, allowance of said Writ, Writ of Error, Assignments of Error, Citation duly served on Defendant in Error, and the Waiver of Undertaking filed herein.

And I further certify that said transcript of the record filed and proceedings had in said Supreme Court of Utah are full true and correct copies of the originals now of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of Utah, this 19th day of January, 1914.

[Seal Supreme Court, State of Utah.]

H. W. GRIFFITH, *Clerk.*

377 UNITED STATES OF AMERICA:

THE PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and The North Union Irrigation Company, a Corporation, Plaintiffs in Error,

v.

CALEB TANNER, Defendant in Error.

Good cause therefor appearing it is ordered that the time for transmitting the record in the above entitled cause to the Supreme

Court of the United States, by virtue of the Writ of Error heretofore issued to the Supreme Court of Utah, be, and the same is hereby extended for a period of thirty days.

W. M. McCARTY,
Chief Justice Supreme Court, Utah.

Dated Salt Lake City, Utah, January 26, 1914.

Filed Jan. 26, 1914. H. W. Griffith, Clerk Supreme Court, Utah.

Endorsed on cover: File No. 24,060. Utah Supreme Court. Term No. 367. The Provo Bench Canal and Irrigation Company and The North Union Irrigation Company, plaintiffs in error, vs. Caleb Tanner. Filed February 18th, 1914. File No. 24,060.

Office Supreme Court, U. S.
FILED
MAR 11 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1914.

No. [redacted] 72

THE PROVO BENCH CANAL & IRRIGATION COMPANY, and THE NORTH UNION IRRIGATION COMPANY,

Plaintiffs in Error.

vs.

CALEB TANNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Filed March...., 1915.

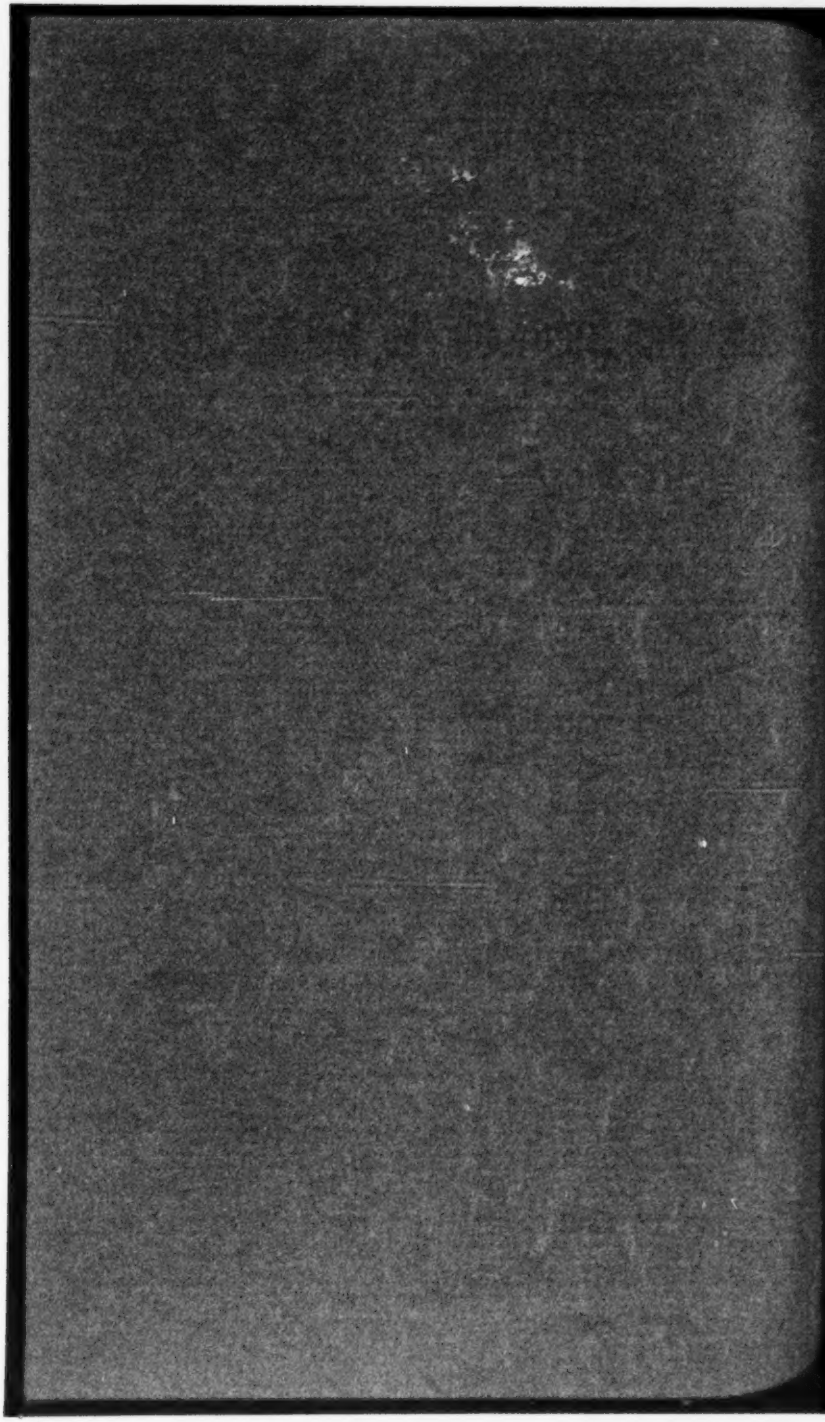
Received three copies of the within Brief this..... day of March, 1915.

.....

Attorney for Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

J. W. N. WHITECOTTON,
Attorney for Plaintiffs in Error.



Supreme Court of the United States

OCTOBER TERM, 1914.

THE PROVO BENCH CANAL & IRRIGATION COMPANY, and THE NORTH UNION IRRIGATION COMPANY,

Plaintiffs in Error.

vs.

CALEB TANNER,

Defendant in Error.

STATEMENT OF THE CASE.

In the month of July, A. D. 1908, this action was commenced in the Fourth Judicial District Court of the State of Utah, in and for Utah County, by filing the amended complaint of the Plaintiff in the action, who is the defendant in error here. Plaintiff claimed in brief, that the defendants therein named were the owners of a certain canal therein described, which was used for conveying water for irrigation; that the plaintiff owned certain water which he desired to use for irrigation, and that by entering and enlarging the canal of the defendants, he could carry his water through their said canal. To this complaint, the defendants therein made answer and said among other things: that they admitted the ownership and use of their said canal; they denied the ownership of water by the plaintiff as alleged; they objected to the entrance of the plaintiff into their canal and alleged that their

said canal had been constructed at a cost to them of approximately $50,000.00, and upon these issues the case went to trial before the court, sitting without a jury. The proof at the trial supported the allegations of the parties in the complaint, and answer respectively in substance. The proof showed that the plaintiff owned some water; that the route of the defendants' canal was the only practical and feasible route for the conveyance of water from the common source to the point where it was desired to use the same for the irrigation of the lands named; that the costs of the construction of the defendants' canal represented an outlay of about $45,000.00; that it was possible and feasible for the plaintiff to enter the said canal and enlarge the same so as to permit it to carry the water of the plaintiff in addition to that of the defendants, and that said enlargement could be made without material injury to the canal of the defendants. The court granted the prayer of the plaintiff that he be permitted to enter and enlarge said canal at any time between the first day of October and the first day of March, and that for such enlargement and future use of said canal in common, he pay to the defendants the sum of one dollar each. It was also shown at the trial that such a canal could be constructed by modern methods of canal construction for not much in excess of $10,000.00. To this judgment of the court, the defendants took exceptions, claiming that the disposition made of the matter was, in effect, a taking of the defendants' property without just compensation, and consequently, without due prcoess of law, in violation of the provisions of the XIV Amendment to the Constitution of the United States. These objections were overruled by the State trial and Supreme Courts, and the judgment of the trial court was sustained by a decision handed down on the 26th day of December, 1911, and on the 4th day of December, 1913, the Plaintiffs in Error filed their Petition for a Writ of Error to the Supreme Court of the State of Utah, which was allowed by the Chief Justice of Utah, and filed on the same day.

In their Assignment of Error for a reversal of the judg-

ment of the State Supreme Court, the Plaintiffs in Error, say:

"That the Supreme Court of the State of Utah, in rendering its decision and judgment in this cause, erred in the following respects, to-wit: The said court erred in affirming the judgment of the trial court and awarding to the plaintiff in the lower court the privilege of entering upon and enlarging the canals of the defendants there, plaintiffs in error here, and making use of said canals, upon payment of the mere nominal consideration of one dollar to each of these plaintiffs in error, for the reason that such award and judgment is, in effect taking the property of the plaintiffs' in error and giving it to the defendant in error for no consideration, and is, therefore, taking said property without due process of law in violation of Section One of Article XIV of the Amendments to the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law." Which provision of the Constitution of the United States was expressly cited, urged and relied upon by the defendants in said Supreme Court of the State of Utah, as a ground of reversal of the judgment of the trial court."

The crux of the whole matter has so far appeared to be upon the question: Is there a taking of the property of the defendants, plaintiffs in error here?

ARGUMENT.

We assume that the contention of the defendant in error here as elsewhere, is that by the provisions of Section 1288X22, Compiled Laws of Utah, 1907, any person, corporation, or association entitled to the use of water, who desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation, or association, or the owner or owners of

the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged for the damage, if any, caused by said enlargement. * * *

Under the provisions of this statute, the defendant in error has been awarded the right to enter our canal, enlarge the same and convey his water through the same ever after, upon payment to us of the munificent sum of one dollar to each of the owners of the canals, and the record shows the canals to be but different sections in length of one canal. The defendant in error claims that he does not in any sense take our property, and hence, he contends, there is no **taking** in the legal sense of that term. This we, of course, controvert. After all, the whole question is, was there a taking of the property of the canal owners? We respectfully submit that there is such a taking very clearly established. We made the canal; it is our property; the plaintiff has no interest in it unless that can be called an interest which the court confers upon him without consideration. No one will claim that we are given any consideration for our property.

This questions is not without authoritative answer. In Mills on Eminent Domain we find the following language: Section 31:

"The right to use property is the valuable feature of property. Property is the right to possess, use and enjoy, and dispose of a thing. Under the term 'Property' is included, not only the land owned, but also every right which accompanies ownership and is its incident. The right of using necessarily includes the right and power of excluding others from using the same property. The constitution is intended to protect all the essential elements of ownership which make property valuable, and when an easement of any sort is taken in property, a certain portion of the property is taken, and that taking requires compensation. Easements which owners have over the

lands of others are property, and a taking or interference with the same is a damage for which compensation should be paid."

If this statement of law be correct, then surely these canal companies have a property in the canals which the plaintiff may not interfere with without taking their property, although the plaintiff has claimed all the time that there is no taking for which he should pay compensation. As we understand the law, there may be no taking without compensation. No pretense of compensation is claimed. The Supreme Court of Colorado had this same question before it in the case of Trippe vs. Overacker, 7 Colo. 72, 1 Pac. 695, and in construing a statute similar to ours, said:

"The proprietor of an irrigating ditch, whether upon his own premises, or those of another, has a property ownership, both in the ditch and the right of way therefor, and using or enlarging such ditch without the owner's consent, is as much a taking or damaging of private property within the meaning of the Constitution as would be the appropriating of the right of way therefor in the first instance. But such taking or damaging cannot be tolerated except upon payment in a constitutional manner of just compensation. * * * The right to enlarge and use the ditch of another already constructed will be enforced in the same manner and under the same law as the right to take or damage any other kind of private property."

The same Court again said, in the case of Sand Creek Lateral Irrigation Co. vs. Davis, 17 Colo. 326; 29 Pac. 742:

"The property taken or sought to be taken was a right of way through defendant's ditch. Such right of way was the property of the defendant. It is true petitioner did not seek to deprive defendant of its rights of way altogether, but he sought to acquire an interest therein to be used in common with the defendant. Such right of way had a money value, and the interest which the petitioner sought to acquire therein also had a money value."

We submit this statement exactly fits the case at bar. It is true that plaintiff below, defendant in error here, does not

seek to entirely exclude the plaintiffs in error from their property, nor to exclude them at all, but he does seek to share their property with them as much as if he had been one with them from the inception of their ownership. They have incurred the cost of making the canal, and he is given the privilege of making as much use of it as they, to convey all his water through it. Has he not been awarded a property right so far as lies in the constitutional power of the highest court in the State of Utah, to award it to him? Let us suppose the canal had happened to be large enough without alteration to carry his water in addition to that of the owners. Could he not with equal reason claim the right to come in and share it with the men whose money had furnished it? Are the owners of these canals under any obligation to furnish him a waterway? We think not. The statute under which the plaintiff below appears to have been proceeding makes no provision whatever for a taking of property, but only for such damage as may be sustained by the owner in having his property tampered with by a judicially authorized intruder. We say this is a taking in every sense of the term. Let us suppose that A. owns a house built with strong walls, so that it will easily support another story in height. B. has no house at all. By a legislative enactment, he is given the right to go and raise the roof of A.'s house and build another story upon it and occupy it with his family. When brought to book for doing such a thing without A.'s consent and without compensation to A., he answers: "I am not taking your house. It is still there and you are permitted to continue to occupy it." Would such a plea be good to any court that pretended to regard constitutional rights? Manifestedly not. Or, suppose that A. owns a railroad which he is operating. B. concludes he would like to operate a train of cars. He purchases a train, and puts in on the track immediately behind the owner's train and runs it. When called to account, he says: "I am not taking your railroad; you still have the use of it; I keep my cars behind and out of the way of your trains. I am not taking your railroad;

it is still there." And yet he is enjoying its use without paying the owner a cent for it. This seems too preposterous to be considered a minute.

As we understand the case, the Supreme Court of Utah tries to justify its decision upon the Utah Statutes and particularly Section 1288X22, of the Compiled Laws, 1907, which is in the following language:

"RIGHT TO ENLARGE EXISTING CANAL. When any person, corporation or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; Provided, that said enlargement shall be done at any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch."

This section cannot justify the court's decision, for the plain reason that it does not provide for the compensation of the owner for the taking of his property at all. Then the vital question is, is there a taking of the property of the owner or owners of the canals to be enlarged. Measured and tested by the authorities already cited, we submit there is such taking, and, if a taking, then there must be compensation given or the taking is without compensation, and therefore without due process of law and any judgment so depriving the owner of his property is null and void.

The plaintiffs in error especially invite the Court's attention to the dissenting opinion of Mr. Justice Straup, of the Supreme Court of the State of Utah in the case of Salt Lake City vs. Irrigation Company, immediately following the Court's decision in the case at bar, 40th Utah, page 147. We

believe this dissenting opinion states clearly the law of the case.

To us, it is utterly incomprehensible that the privilege given to the defendant in error in this case, is not a taking of the property of the plaintiffs in error. The assessed compensation of one dollar, no one will pretend is at all a compliance with the requirement of just or any compensation. So far as the State Supreme Court attempts to justify its decision by the provisions of the statute set out above, it leans upon a broken reed; and must fall. If there be any otheer attempted justifications, we are unaware of.

Briefly, we have the situation: The owners of the canals in question commenced their construction about the year 1865, and after long years of toil they were completed to their present size and carrying capacity in 1878, at which time they became practically capable of carrying the owners' water without waste. Here in 1908 comes the defendant in error and asks the privilege of entering upon, and enlarging said canals so that they will carry his water also; the Court tells him that he may enter and avail himself of our canals, by enlarging them and that by paying us for the damage done to us by such enlargement, and proceeds to assess our damage at one dollar, the price of eight cigars, whereby he becomes a co-owner with us in a property that cost us to construct in round numbers, $45,000.00. No provision whatever is made by the court nor by the statute by which it seeks to justify its action for compensating the owners for the taking of their property. This we candidly believe to be depriving us of our property without due process of law, and this is in violation of our constitutional rights. It is true we may still use the canals; but we have forced upon us from now on not the **exclusive** use by another of our property, but the **joint** use of it with another. This certainly is an invasion of our legal rights. What assurance has the builder of a canal that he is building for himself alone and not for the first or hundredth man who may covet an interest therein, and can get from the court an order that

will require the owner to admit the newcomer? We do not question the power of the State to provide that any one who has water for useful purposes, may condemn a right of way through another's canal to convey his water by paying just compensation; this question was settled in the case of Clark vs. Nash, 198 U. S. 362, where the court held, that irrigation was in that case a public use such as would support and authorize condemnation as for a public use. There, no question of compensation was made. That had been provided for so far as the record discloses. Here it is proposed to take the neighbor's property without compensation.

It is respectfully submitted that the judgment of the Supreme Court of the State of Utah ought to be reversed for the reasons above-stated.

J. W. N. WHITECOTTON,
Attorney for the Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM, 1914

No. [illegible] 42

THE PROVO BENCH CANAL & IRRIGATION COMPANY, and THE PROVO BENCH IRRIGATION COMPANY,

Plaintiffs in Error,

vs.

CALEB TANNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH

Filed [illegible], 1915.

Received [illegible] copies of the within Brief this [illegible] day of [illegible], 1915.

[illegible]

Attorney for Plaintiffs in Error.

BRIEF OF DEFENDANT IN ERROR

[signature]

D. O. HOUTZ,

Attorney for Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1914.

THE PROVO BENCH CANAL & IRRIGATION COMPANY, and THE NORTH UNION IRRIGATION COMPANY,

Plaintiffs in Error.

vs.

CALEB TANNER,

Defendant in Error.

In answer to the brief of plaintiffs in error, we respectfully submit:

That for the purpose of facilitating the development of agriculture in the West by means of artificial irrigation, Utah, with other states, has provided for and authorized the exercise of the power of eminent domain to the extent that owners of canals and ditches carrying water for irrigation and other purposes may be compelled to allow an enlargement of such waterways and a joint use thereof by those having water rights.

The Utah Statute on the subject is quoted on page 7 of the brief of plaintiffs in error. The Statute has been held by this Court to be valid.

Clark vs. Nash, 198 U. S. 362.

But it is said that the Statute referred to "cannot justify the Court's decision for the plain reason that it"—supposedly the decision—"does not provide for the compensation of the owner for the taking of his property." And it is also said by the plaintiffs in error in their Assignment of Error for

a reversal of the judgment of the Supreme Court of the State, "that the Supreme Court of the State of Utah, in rendering its decision and judgment in this cause, erred in the following respects, to wit: The said Court erred in affirming the judgment of the trial court and awarding to the plaintiff in the lower court the privilege of entering upon and enlarging the canals of the defendants therein, plaintiffs in error here, and making use of said canals upon payment of the mere nominal consideration of one dollar to each of these plaintiffs in error for the reason that such awarding and judgment is, in effect, taking the property of the plaintiffs in error and giving it to the defendant in error for no consideration, and is therefore taking said property without due process of law, in violation of Section 1, of Article 14 of the Amendments to the Constitution of the United States, which provides, 'Nor shall any state deprive any person of life, liberty or property without due process of law.'"

It is not contended that the State court was without power to render judgment vesting defendant in error with the right to enlarge the canal described in the complaint.

But it is claimed that the judgment did not provide just compensation for the loss sustained by the plaintiffs in error through the defendant in error entering upon and enlarging the canal and using it as a waterway with the plaintiffs and that, on account of such failure on the part of the Court, due process of law was not observed.

We will grant that if, by the judgment complained of, the property of plaintiffs in error were taken from them without just compensation in the legal sense of the term, such taking was in violation of the provision of the Constitution quoted in the brief of plaintiffs in error; and, of course, in such case, the judgment cannot stand.

Plaintiffs in error have quoted, on page 7 of their brief, Section 1288x22, of the Compiled Laws of Utah, 1907. This section is the one upon which defendant in error relies in particular as the foundation for the proceedings instituted by him to recure the right to enlarge and jointly use the

canal. But, in addition to that section, the State of Utah has prescribed Chapter 65, which includes Sections 3588 to 3608, inclusive, of the Compiled Laws of 1907. The chapter not only authorizes the exercise of the power of eminent domain by persons and the taking of private property for public use, but prescribes the procedure in matters of that kind.

In the case at bar, it was intended that the proceedings should conform not only to the section quoted in the brief of plaintiffs in error, but also that the proceedings should comply with the requirements of said Chapter 65; and we venture to assert that an examination of the record will show that they did. If the proceedings in this case were in keeping with the State law, which, in a general way, conforms with the legislation of most states, due process of law was observed, because the Statute prescribes forms and procedure which, if conformed to, should work out justice.

Plaintiffs in error may not have received by the judgment all they may think they are entitled to; but the sum of money to which they were entitled as compensation for the property taken had to be determined by the trial court, in the ordinary methods of procedure, from the evidence introduced at the trial. They bitterly complain of that part of the judgment which awarded them compensation in a nominal sum, as they say: "The price of eight cigars," and that such amount is no compensation at all and that by the judgment their property is actually **taken** and **given** to defendant in error.

It will require an examination of the evidence introduced at the trial to determine whether the property of plaintiffs in error was taken and given to defendant in error without just compensation. They were entitled only to what they proved their loss to be.

We regret that the record presented to this Honorable Court contains matter rendering it cumbersome and pertaining to questions not to be passed upon here, but which were regarded as of enough importance to be pre-

sented by plaintiffs in error for the decision of the Supreme Court of the State. The superfluous part of the record may be passed. But the Court's attention is invited to the other portion pertaining to the question of whether or not plaintiffs in error received just compensation for the property taken.

ISSUE.

Defendant in error desires the privilege of assigning his own ground of contention in this case and objects to plaintiffs in error taking that privilege away from him: and before proceeding to a consideration of what the record may justify awarding to plaintiffs in error by way of compensation, we desire to disclaim that we make such contention as it is said by the other side we make. This matter seems important and we wish them to plainly understand our attitude, in order that we may not be "reasoning with unprofitable words and making speeches whereof no good can come."

It is said by plaintiffs in error: "The crux of the whole matter has so far appeared to be upon the question: Is there a taking of the property of the defendants, plaintiffs in error here?"

Defendant in error does not claim that there was no taking of property by the judgment. He says that "The crux of the whole matter" is not, "Is there a taking of the property of the defendants, plaintiffs in error here?" Defendant in error agrees that there was a taking of property, but a taking of property, as he understands it, may be, and likely is, something entirely different from the notion of plaintiffs in error regarding such a matter. Property may be merely a relation recognized and maintained by law between a proprietor and things. Any modification of the relation would be a taking of property. In that sense we agree that there was a taking.

We respectfully submit that the issue between the

plaintiffs in error and the defendant in error is not—Was there or was there not a taking of property in the proceedings complained of?—but the issues are, What was taken, and what pecuniary loss was sustained by plaintiffs in error by reason of the taking, and was just compensation in the legal sense, allowed by the judgment to plaintiffs in error?

They have cited—

Trippe vs. Overacker, 7 Colo. 72;

Sand Creek Lateral Irrigation Co. vs. Davis, 17 Colo. 326;

Mills on Eminent Domain, Sec. 31;

as authorities on the proposition that the decree in this case, if permitted to stand, takes their property and vests it in defendant in error. We agree that the law is correctly stated in the authorities cited and that the decree in this case has the effect of taking the property of plaintiffs in error and vests it in defendant in error. So that matter may be passed by.

The State of Utah has not deprived plaintiffs in error of their property **without due process of law.** And whether they were so deprived or not, will be determined by the evidence introduced at the trial. The evidence will show what was taken: and what was taken will more or less indicate the loss sustained by plaintiffs in error. And, of course, what they were deprived of, and no more, they are entitled to compensation for.

In granting that the decree effected the taking of property, let us again say: We do not want to be understood as admitting that there was any corporeal thing taken.

The decree does not allow more than the right to enlarge the canal. It does not authorize the appropriation of any part of its carrying capacity as it now exists. It will be noticed that the Statute referred to and quoted in the brief of plaintiffs in error does not authorize the

taking of any water carrying capacity from the canal in existence, but provides that the existing canal may be enlarged in its carrying capacity to the extent required for the additional use. So in this case, as in all condemnation proceedings under the Statute referred to, the person condemning and securing the right, acquires, not the water carrying capacity already existing in a canal, but the right to use in common with the owners, a carrying capacity to be created by the person in whose favor the judgment may be given.

If defendeant in error has taken too much space in this brief and consumes too much time of the Court in an effort to make plain his contention in this behalf, he hopes that the obstinate persistence of plaintiffs in error from the beginning of the trial of this cause to have the matter in question decided, not on whether the judgment afforded just compensation for what was taken, but on the question of whether or not **property** was taken, will justify him.

We beg to return to the Record, and ask the Court's attention thereto, for the purpose of determining whether or not the trial court was justified in giving any more than nominal damages to plaintiffs in error for the property taken. The **taking** and **property** being in a general sense as above expressed. The damages awarded were nominal, one dollar to each of the defendants. As plaintiffs in error say, somewhat flippantly and inconsiderately: "The price of eight cigars," which rather indicates the quality and price of that article consumed by the author of the brief containing the statement. He might have put it, as we have been informed: The price of twenty cigars, or of one. But we disclaim any accurate information regarding the price of the weed, and do not understand that such a matter is decisive of the question involved.

While the Court is examining the record for the purpose of ascertaining whether the trial court awarded just com-

pensation, for what was taken, we respectfully ask that the following be borne in mind:

PLEADINGS.

Plaintiffs in error are in no position, under the pleadings, to claim more than a nominal sum as compensation.

Defendant in error was not bound to plead or prove damages or value. It was for plaintiffs in error to plead and prove both damages and value, which they signally failed to do.

Section 3594, Compiled Laws of Utah, provides what a complaint in condemnation proceedings shall contain. It does not require the value of the things sought, to be alleged; nor any damages which might be sustained by the defendant to be set out in the complaint. Chapter 65 of said laws does not specially provide what the answer shall contain. But Section 3606 of that chapter reads:

"Except as otherwise provided in this chapter, the provisions of this code relative to civil actions, new trials and appeals, shall be applicable to and constitute the rules of practice in the proceedings in this chapter."

For the convenience, merely, of the Court, we beg to say that the pleadings required by the code are the "formal allegations of the parties, of their respective claims and defenses for the judgment of the Court."

Section 2956, Compiled Laws of Utah.

An answer is required from the defendant which shall contain "any new matter constituting a counter-claim."

Section 2968, Compiled Laws.

"Where the defendant deems himself entitled to an affirmative judgment against the plaintiff by reason of counter-claim interposed by him, he must demand the judgment in his answer."

Section 2975, Compiled Laws.

It will be observed that the complaint is silent on the question of compensation or damage, and the answer is equally mute. Nowhere is it alleged or denied that the thing we seek is of any value whatever or that doing what we want the right to do will or will not damage defendants in any sum at all. There can be no pretense of expressed issue in the pleadings on the question of compensation or damage. The answer of defendants in the trial court is at least an implied admission that no damage will result to them except for improper execution of the work of enlargement and they ask only that a bond may be required to protect them from defective enlargement. No demand whatever is made by defendants for any judgment, except that they recover their costs, although to entitle them to damage or compensation, a demand for it is necessary.

Section 2975, supra.

Apart from statutory requirements, we do not think the defendant would have to plead the matter of value or damage in order to be permitted to prove it. An examination of the decided cases shows a slovenly and loose procedure generally recognized in condemnation procedings. However, it appears quite plain that the Utah code requires the definite formation of written **issues** on all matters in dispute in condemnation proceedings, the same as in any ordinary civil case. And if the Utah code does require such written issues, certainly the defendants, plaintiffs in error here, under the pleadings, could not have introduced any evidence on the matter of value or damages, had they offered it.

The California code on the matter of Pleading is the same as that of Utah, and in the case of San Diego, etc., vs. Neal, 25 Pac. 977, when the question of burden of proof was presented, the Court says: "The burden of proof as to value was on the defendants. It was their duty to **allege** and prove the value."

An examination of the answer of defendants, plaintiffs in error here, will show that there is no claim made or

pretended to be made that damage will result from what the plaintiff in this case is seeking the right to do.

BURDEN OF PROOF.

Even if it were not necessary for the defendants in their answer to allege the facts entitling them to compensation or damage, but that the same could be proven without formal issues, it must be allowed that the burden was on them to prove value and damage.

Chief Justice Frick, of the State Supreme Court, in the judgment appealed from, expresses the law pertaining to burden of proof so clearly and, we think, accurately, that we beg to quote him on that subject. He says:

(Tanner vs. Provo Bench Canal Irrigation Co. et al, 121 Pac. 589),

"It is also contended that the burden of establishing the amount of damage was upon respondent and that in any event, the Court erred in permitting him to enter upon appellants' property before he had established what was just compensation for appellants' property, taken or affected by his proposed improvement. We think, however, that, under the practice in force in this jurisdiction, the burden of establishing the quantum of damages was upon the appellants. Such has always been, and continues to be, the practice in the district courts of this State. Moreover, such is the great weight of authority under statutes similar to ours. In 15, Cyc. 898, the prevailing rule upon this question is as follows: 'The burden of showing necessity and public use is upon the petitioner. The burden of showing the damages which the owner will suffer, rests on him.' In 2nd, Lewis, Eminent Domain (3rd Ed.), Sec. 645, the rule is stated to be in accordance with the text quoted from Cyc. and the author of Lewis' Eminent Domain' in part at least, collates the cases both for and against the rule as stated. In addition to the numerous cases cited by Lewis, see also, Monterey Co. vs. Cushing, 83 Cal. 507, 23 Pac. 700. Los Angeles Co. vs. Reyes (Cal.), 32 Pac. 233, and cases there cited."

In the case of Colorado Central vs. Allen (Colo.), 22 Pac. 605, it is said:

"In proceedings to condemn property for public use, the burden is on the defendant to show the value of the property or interest therein actually taken, as well as the damages, if any, to the residue of such property."

In the case of Monterey Co. vs. Cushing, 23 Pac. 701, Hayne, C., says:

"If no direct evidence be introduced upon any issue, the fiding should be against the party who had the burden of proof. To say that the burden of proof is upon a party is equivalent to saying the presumption is against him. A presumption is indirect evidence and, if not controverted, the jury are bound to find according to the presumption. Then was the burden of proof upon the defendant as to value, etc.? The authorities in relation to burden of proof as to value in proceedings in eminent domain are conflicting. In California the burden as to value is on the defendant. Section 1244 of the code of civil procedure, (which is exactly the same in language as the Utah code, Sec. 3594) provides what the complaint shall contain, and it does not mention value and damages, and if the plaintiff is not required to allege value or damages, he is not required to prove it."

In Los Angeles Co. vs. Reyes, 32 Pac. 233, it is said:

"The first point urged by the appellant is that the evidence is insufficient to justify the verdict and the findings of the Court, especially as to damages awarded the defendants. * * * The appellant cannot complain if, as urged by counsel, there was no evidence, since in proving damages in condemnation proceedings, the burden is on the defendant."

The defendants in the trial below did not plead facts entitling them to demand compensation or damage. We think they should have done so in order to introduce evidence on these matters. But, in any event, the burden of proof was on them to establish the money value of the thing they were deprived of by the judgment.

PROPERTY TAKEN.

If plaintiffs in error owned the land through which their canal extends, it might be claimed by them that the existence of their canal makes it much less expensive to create capacity for water carrying purposes by enlargement, than the cost of constructing an independent canal would be, and on account of that facility a valuable property right exists in their favor. But, as the Record shows, plaintiffs in error have no right to enlarge their canal and it cannot be said that defendant in error, by the judgment, deprived them of any enlarging right. The defendant in error, as appears in the Record, acquired from the owner of the land the right to enlarge the canal described in the complaint so far as such owners could grant the right. It will therefore appear that the **taking** of property from plaintiffs in error, resulting from the decree complained of, consists merely in adding a carrying capacity to their canal with the right to flow in the enlarged canal the amount of water that defendant in error might divert into it, not exceeding the added carrying capacity.

Except for the technical, legal sense of the terms, "taking" and "property," one must be somewhat at a loss to understand how or why an enlargement of the canal, under the circumstances, and flowing water therein with the former owners, constitutes a **taking of property.**

But as we understand that any modification of the legal rights of a person does, to the extent of such modification, add to or take from his property—property being merely the relation which the law maintains between persons and things, corporeal or incorporeal.

In case the canal was of larger capacity than was required to carry the water of plaintiffs in error, they had the right to prevent any person, or persons, for compensation or otherwise, from using their excess to carry water. Not even that right is invaded by the Court's decree. The defendant in error, before he is entitled to use the canal, must enlarge it to the extent that he adds water, thus leaving any excess

capacity to be disposed of by plaintiffs in error precisely the same after the defendant in error has turned his water into the canal as before he did so. Then again, no right of control is interfered with. The plaintiffs in error control the canal and the whole of it after the water of defendant in error is turned in, to the same extent as they did before, and any inconvenience sustained by plaintiffs in error in that regard must be compensated for. What thing of value, therefore, are the plaintiffs in error deprived of?

What was the property taken by the judgment complained of? Except in the driest, legal sense of the term "property," nothing was taken. Plaintiffs in error had a canal about fourteen thousand feet long. Its water carrying capacity at the head was about 125 cubic feet of water per second of time. It grew less in size toward the approach to the lower end of the canal. It was constructed along a hillside for a considerable distance and then extended out onto a mesa, or bench, which was less sloping. It extended over territory to which the plaintiffs in error had no right or title whatever, except an easement for their canal purposes. The record conclusively shows that the canal was susceptible of enlargement without material injury to the canal. The judgment allows defendant in error to enlarge the canal by removing sufficient earth from the upper side of the canal to add ten cubic feet of water per second of time carrying capacity to the canal, the earth to be placed on the lower bank. Defendant in error is not permitted by the judgment to appropriate any portion of the carrying capacity of the canal, as it exists. Even where it is larger than the necessities of plaintiffs in error demand, defendant in error is required by the judgment to add the same water carrying capacity as in other places along the canal. The work of enlargement is required to be done under the direction of a competent engineer whose services are to be paid for by defendant in error. Where the bed, or side of the canal is broken, defendant in error is required to properly puddle, or

seal, the same to make it as proof against loss by seepage as at the present time. The decree further provides that all loss of water in transit by reason of the enlargement shall be taken from the water turned into the canal by defendant in error. The decree further provides that a perpetual bond shall be given by defendant in error to protect plaintiffs in error from any loss or damage which they may sustain by reason of any defective enlargement or damage which might result to the canal, or any person, by reason of the added flow of water therein. Also, to guarantee payment to plaintiffs in error for such cost and additional charges as might arise on account of handling and dividing the additional water turned into the canal by defendant in error. The plaintiffs in error are given the right to control the entire flow and charge defendant in error for any expense incurred on account of handling and dividing the added water.

The property taken is clearly described by Judge Frick in the opinion written by him affirming the judgment appealed from. He says:

It must be remembered that it is conceded that appellants did not own the fee of the land traversed by the canal in question, but all they owned was an easement, or right of way and the right to maintain the canal upon the land in question. All that respondent sought to, and all that he could condemn as against appellants, was a similar right, or easement. Respondent's easement was, however, to be imposed upon, or added to appellants' existing easement. No doubt, appellants' easement, in legal contemplation, constituted property and an interference with, or impairment of it, was, in legal effect, an interference with property, or with a property right belonging to them and for such interference or impairment, they are entitled to what our Constitution terms 'just compensation.' If appellants' easement, therefore, is regarded as property, it nevertheless is property which was, and could be, used only for a particular purpose, namely, for the purpose of conveying water for certain purposes from one point to another in Utah County. Under such circumstances, the measure of damages was the extent to which it, (the easement) was rendered less valuable for the uses to which it was devoted."

Counsel for plaintiffs in error, (Page 6 of their brief) for the purpose, apparently, of showing a valuable property right taken from plaintiffs in error by the judgment says:

"Let us suppose the canal had happened to be large enough without alteration to carry his water, in addition to that of the owners. Could he not, with equal reason, claim the right to come in and share it with the men whose money had furnished it? Are the owners of these canals under any obligation to furnish him a water way? We think not."

There was no such a taking in the case at bar. Carrying capacity already existing in a canal is entirely a different thing from a right to add to the carrying capacity existing. The Statute relied upon by defendant in error does not authorize the condemnation of existing water carrying capacity in any canal. The two cases are essentially different. The illustration on the same page of the brief of plaintiffs in error of permitting an additional story to be added to a residence, bears less analogy to the case at bar than the canal, which was plainly remote enough. Again on the same page it is said:

"Suppose A owns a railroad which he is operating. B concludes he would like to operate a train of cars. He purchases a train and puts it on the track immediately behind the owner's train and runs it. When called to account he says: 'I am not taking your railroad. You still have the use of it. I keep my cars behind and out of the way of your train. I am not taking your railroad. It is still there.'"

Why such an illustration is used in argument on the real question at bar is beyond our comprehension. It could be drawn nearer to the case at bar if it had been said that a railroad company had a right of way, with tracks upon it, operating trains over the same and B sought the privilege of laying on the right of way additional tracks and operating trains upon such tracks on the easement of A. The analogy then would be a coarse one taken into consideration with the case at bar. B would be taking possession of part of the territory covered by the railroad company's easement. It would

be nearer to the case of taking existing canal water carrying capacity.

But none of the supposed cases comes near to the case at bar. Here plaintiffs in error had an easement for canal purposes. It was limited in territorial extent. Defendant in error went outside of the territory burdened by the easement of plaintiffs in error, but contiguous to their canal, and acquired the right from the owners of the fee to remove the soil contiguous to the canal of plaintiffs in error and create water carrying capacity. Of course, the effect was that one, instead of two canals then existed. The original canal was in effect enlarged, but the enlargement took place outside of any rights of plaintiffs in error except the right that their canal should remain its original size and not be enlarged with the enlarging parties vested with the right to flow water in the enlarged canal, to the extent of the enlargement. The enlarging of the canal, in that manner, would necessarily be an interference with the canal of plaintiffs in error and it would result in a commingling of the waters. The rights of plaintiffs in error would be somewhat modified.

MEASURE OF DAMAGE.

What is the measure of damage, or rule to determine just compensation in such a case as the one at bar? If the proceedings were for the purpose of condeming territory to the extent of taking the fee, or establishing rights of easement on real property, the ordinary rule would prevail. Just compensation would be the actual money value of the thing taken, determined by the market value, and damage, if any were sustained, to the adjoining property by reason of the taking. But here, while we admit a taking of the property, it is little, if any, more than an interference. And the question, therefore, is—To what extent is the value, or the value of the use of appellants' canal reduced by enlarging it to the extent and for the purpose permitted by the trial court?

Again we ask permission to quote from the opinion of the

Supreme Court of the State in the case at bar, 121 Pac. 589. It is said:

"Counsel, however, urge that to permit respondent to use their canals, as contemplated, will be of great advantage and may result in considerable profit to him. This may be so, and yet the question remains—In what way does what he is permitted to do damage appellants? They are limited in their recovery by the amount of damage suffered by them. They cannot recover for any benefit respondent may receive. If the benefits and advantages that may be obtained through the exercise of the right given by Sec. 1288x22, supra, must be paid to the owner of the canal before the right can be exercised, then the purposes sought to be obtained by said Section are thwarted and the supposed advantages and benefits to be derived therefrom are neutralized and the Statutes may as well be repealed. While counsel for the appellants has been unable to find, nor have we found, any case precisely in point, yet analogous cases in which the principle respecting the measure of damages applicable to the case at bar as illustrated and applied are not rare. In the case of Chicago B. & Q. R. D. Co. vs. Chicago, 166 U. S. 226, counsel for the railroad company advanced precisely the same arguments that are presented by counsel for appellants in this case. In that case a public easement was imposed upon, or added to a private easement, just as in the case at bar. A public street crossing was laid over the company's right of way, and in doing so it was required to open up a crossing and maintain it and assume the risk incidental to a public railroad crossing in the city. The amount of damages allowed in that case was one dollar, as in this case, and the company contended that its property was being taken without just, or any compensation, and therefore was taken without due process of law. Justice Harlan, in his opinion, considered the company's contention from almost every point of view and the Court arrived at the conclusion that the damages of one dollar awarded the company, in view of all the circumstances, constituted just compensation. In the course of the opinion it is said: 'The contention of the railroad company is that the verdict and judgment for one dollar as the amount to be paid to it, was, in effect, an appropriation of its property rights without any compensation whatever, but the judgment should be read as if in form, as well as in fact, it made no provision whatever for compensation for the property so

appropriated. The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such a sum as, under all the circumstances, is fair and full equivalent for the thing taken from him by the public. If the opening of a street across the railroad tracks did not unduly interfere with the company's use of the right of way for legitimate railroad purposes, then its compensation would be nominal.' "

In 4, Suth. Dam. (3rd Ed.) Sec. 1063, at page 3104, the author, in discussing what constitutes just compensation for taking property under right of eminent domain, said:

According to the best authorities, however, it is believed to be remuneration for the net injury which is suffered from the exercise of the sovereign right. The word, 'compensation' imports that a wrong or injury has been inflicted and must be paid to the extent of the injury. This may be less or more than the value of the property taken, but when compensation has been made to the extent of the injury, the language or just purpose of the Constitution are satisfied."

See also Chicago B. & Q. R. D. Co. vs. Chicago, 149, Ill. 457, 464.
Postal Tel. etc. Co. vs. O. S. L. R. Co., 23rd Utah, 474, 65 Pac. 735.
Village of Orleans vs. Steyner, 135 N. Y. 341.
Matter of Adams, 141 N. Y. 297.
Anderson vs. Hudson Ry. Co., 55 N. Y. 661.
Matter of City of Brooklyn, 73 N. Y. 184.
Joyce on Damages, Sec. 76.

JUST COMPENSATION.

A nominal sum may constitute just compensation for property taken in a condemnation proceeding. In the case of Chicago, Burlington, etc. R. D. vs. Chicago, 166 U. S. 228, this court says:

"The contention of the railroad company is that the verdict and judgment for one dollar as the amount to be paid it, was in effect an appropriation of its property right, without any compensation whatever; that the judgment should be read as if in form, as well as in fact, it made no provision whatever for compensation for property so appropriated. * * * The owner of private property taken under the

right of eminent domain obtains just compensation if he is awarded such sum as, under all the circumstances is fair and full equivalent for the thing taken from him by the public If the opening of a street across the railroad tracks did not unduly interfere with the company's use of the right of way for legitimate railroad purposes, then its compensation would be nominal."

To the same point see Tanner vs. Provo Bench Canal & Irrigation Co. et al, 121 Pac. 584, and authorities last above cited.

Whether a nominal sum does, or does not, constitute just compensation must depend upon the facts. In this case an examination of the record will show an entire absence of any evidence tending to prove the loss which will be sustained by the plaintiffs in error through the enlargment and joint use of their canal.

In the trial court all the defendants sought to show which might be regarded as evidence bearing on the question of loss or damage to them which would be sustained by the enlargement and joint use, was the cost of the construction of their canal, which they proved to be $45,000. You cannot deduce from that fact anything at all with reference to the injury or loss which will be sustained by the plaintiffs in error from the enlargement of the canal and its joint use. The cost of the canal bears not at all upon the question of damage from interference. All the record shows from which any inference can be drawn touching the question of damage or loss is the fact that the property was taken to the extent we have attempted to show, and that a joint use of the canal will be made between the parties to this action after the enlargement, in proportion to the existing and added carrying capacity, viz. 125 cubic feet of water per second of time to the plaintiffs in error, and 10 cubic feet of water per second of time to the defendant in error. We agree that any taking at all, however slight any interference, entitles plaintiffs in error to damages, but the awarding can be only nominal in the absence of proof.

It is a matter of common knowledge in the region of artificial irrigation that the cost of maintaining canals and controlling and distributing the water which flows therein for irrigation and domestic use, grows more or less comparatively as the size of the canal is large or small. In other words, it will cost more per second foot to maintain a canal of a carrying capacity of 10 cubic feet of water per second of time and control and distribute the water drawn therethrough, than it will a canal of 150 cubic feet of water per second of time, and it is fair to presume that the cost estimated per cubic foot of water for maintaining the Provo Bench Canal, when increased to the size of 135 cubic feet carrying capacity, will be less than while it remains at 125 feet. At least, it could not be said that the cost of maintenance of the canal and distribution of the water would be grater per cubic foot on account of the enlargement. The evidence shows that the enlargement and use of the added capacity necessarily commingles the waters and creates a joint use of the carrying capacity, but how does that harm plaintiffs in error? They have not pretended to say in the record that it will do such a thing, no more than they have that the enlargement will be an injury to them. At least, they have not attempted to show any particular amount. They leave the damages to be awarded to be determined merely from the fact that the enlargement will be a taking of property and interfere with their single use.

In the opinion of the State Supreme Court affirming the judgment of the trial court in the case at bar, Chief Justice Frick, after quoting from 166 U. S., supra, says:

"So here, if appellants' use of their canals is not unduly interfered with by the enlargement and use that respondent is permitted to make of them under the conditions that are imposed upon him, then, in view of the fact that he neither takes any property nor interferes with any substantial property rights of appellants, their damages must be merely nominal. In what way does respondent interfere with appellants' use of the canals? Is it reasonable to assume that 10 second feet of water added to a flow of 125 second feet

or an increase of about 8%, will unduly interfere with appellants' use of the canals? While it is true that the quantity of water which respondent is permitted to add to the present flow in the canals might, under certain circumstances, cause injury, yet, in this case, the evidence clearly shows such a result is not at all likely or probable. Moreover, the decree guards and protects appellants against any future damage or liability that may be occasioned by the enlargement of the canals and the additional flow of water therein. No one can seriously contend that, in view of the evidence in this case, it is possible at this time to say that any material damage will be suffered by appellants in case of the enlargement of the canals."

The State of Utah has not deprived plaintiffs in error of their property without due process of law; and in the light of the testimony, it is plainly seen that the trial court was not authorized to award more than nominal damages for the obvious reason that no evidence was introduced at the trial justifying any judgment for more than that sum.

Respectfully submitted,

D. D. HOUTZ,

Attorney for Defendant in Error.

PROVO BENCH CANAL AND IRRIGATION COMPANY *v.* TANNER.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 72. Argued November 11, 1915.—Decided December 6, 1915.

In eminent domain proceedings, an award of one dollar for property taken for an easement does not deprive the owner of his property without due process of law if the state court recognized the right to recover for any substantial damage, but found as matter of fact that no damage whatever had been shown.

40 Utah, 105, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of a statute of Utah, and judgment of the Supreme Court of that State, regarding rights to flow waters and construct irrigation ditches, are stated in the opinion.

Mr. J. W. N. Whitecotton for plaintiffs in error.

Mr. Charles S. Varian for defendant in error submitted.

Memorandum opinion by MR. JUSTICE MCREYNOLDS, by direction of the court.

Plaintiffs in error, having acquired easements and rights of way over certain lands in the State of Utah, con-

structed thereon connecting canals to convey water intended for irrigation purposes. Relying upon the provisions of a statute of that State (Compiled Laws, 1907, § 1288 x 22) copied in the margin,[1] the validity of which is not contested (*Clark* v. *Nash*, 198 U. S. 361), defendant in error, Tanner, instituted the original proceeding, praying for permission to increase the carrying capacity of the canals, that the character of the enlargement and resulting damages be determined, and that, upon payment of the sum assessed and completion of the enlargement, he be decreed the right to flow water therein. Answers were filed, proof taken, and, the cause having been duly heard by the court without a jury, a decree was entered granting the relief prayed under carefully specified conditions, among them being a perpetual bond to protect against future injuries. Each of the owners was awarded one dollar as damages. Upon appeal the action of the trial court was approved by the Supreme Court. 40 Utah, 105.

Counsel for plaintiffs in error asserts here that, "after all, the whole question is, was there a taking of the property of the canal owners;" and, answering this in the affirmative, he maintains that the judgment below deprives them thereof without due process of law. But the state court, expressly recognizing the right of recovery for

[1] When any person, corporation, or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation, or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; *provided*, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch.

any substantial damage, found, as matter of fact, that none had been shown by the proof and consequently only a nominal sum could be recovered. It declared that "nothing is made to appear upon which a finding or judgment for substantial damage can rest"—"there is no direct evidence upon this point whatever," and cited *Chicago, Burl. & Quincy R. R.* v. *Chicago,* 166 U. S. 226, in support of the award.

The record discloses no error which we can consider (*Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, 89), and the judgment is

Affirmed.